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THE AMERICANS WITH DISABILITIES ACT OF 1989

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Mr. Kennedy, from the Committee on Labor and Human Resources, submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany S. 933]

The Committee on Labor and Human Resources, to which was referred the bill (S. 933) to establish a clear and comprehensive prohibition of discrimination on the basis of disability, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

CONTENTS

		Page
I.	Introduction	1
II.	Summary of the legislation	2
III.	Hearings	4
IV.	Need for the legislation	5
V.	Summary of committee action	21
VI.	Explanation of the legislation	21
VII.	Regulatory impact	88
VIII.	Cost estimate	90
IX.	Changes in existing law	95

I. Introduction

On August 2, 1989, the Committee on Labor and Human Resources, by a vote of 16–0, ordered favorably reported S. 933, the

21-174

S543-11

Americans with Disabilities Act of 1989 (the ADA), with an amendment in the nature of a substitute.

The bill is sponsored by Senator Tom Harkin, chairman of the Subcommittee on the Handicapped, and cosponsored by Senators Kennedy, Durenberger, Simon, Jeffords, Cranston, McCain, Mitchell, Chafee, Leahy, Stevens, Inouye, Cohen, Gore, Packwood, Riegle, Boschwitz, Graham, Pell, Dodd, Adams, Mikulski, Metzenbaum, Matsunaga, Wirth, Bingaman, Conrad, Burdick, Levin, Lieberman, Moynihan, Kerry, Sarbanes, Heinz, Glenn, Shelby, Pressler, Hollings, Sanford, Wilson, Sasser, Dixon, Kerrey, Robb, Fowler, Rockefeller, Biden, Bentsen, Specter, DeConcini, Kohl, Lautenberg, D'Amato, Dole, Hatch, Warner, Pryor, and Bradley.

II. Summary of the Legislation

The purpose of the ADA is to provide a clear and comprehensive national mandate to end discrimination against individuals with disabilities and to bring persons with disabilities into the economic and social mainstream of American life; to provide enforceable standards addressing discrimination against individuals with disabilities, and to ensure that the Federal government plays a central role in enforcing these standards on behalf of individuals with disabilities.

The ADA defines "disability" to mean, with respect to an individual: a physical or mental impairment that substantially limits one or more of the major life activities of such individual, a record of such an impairment, or being regarded as having such an impairment.

Title I of the ADA specifies that an employer, employment agency, labor organization, or joint labor-management committee may not discriminate against any qualified individual with a disability in regard to any term, condition or privilege of employment. The ADA incorporates many of the standards of discrimination set out in regulations implementing section 504 of the Rehabilitation Act of 1973, including the obligation to provide reasonable accommodations unless it would result in an undue hardship on the operation of the business.

The ADA incorporates by reference the enforcement provisions under title VII of the Civil Rights Act of 1964 (including injunctive relief and back pay). Title I goes into effect two years after the date of enactment. For the first two years after the effective date, employers with 25 or more employees are covered. Thereafter, employers with 15 or more employees are covered.

Title II of the ADA specifies that no qualified individual with a disability may be discriminated against by a department, agency, special purpose district, or other instrumentality of a State or a local government. In addition to a general prohibition against discrimination, title II includes specific requirements applicable to public transportation provided by public transit authorities. Finally, title II incorporates by reference the enforcement provisions in section 505 of the Rehabilitation Act of 1973.

With respect to public transportation, all new fixed route buses must be made accessible unless a transit authority can demonstrate that no lifts are available from qualified manufacturers. A pubilc transit authority must also provide paratransit for those individuals who cannot use mainline accessible transportation up to the point where the provision of such supplementary services would pose an undue financial burden on a transit authority.

Title II takes effect 18 months after the date of enactment, with the exception of the obligation to ensure that new public buses are accessible, which takes effect for solicitations made 30 days after the date of enactment.

Title III of the ADA specifies that no individual shall be discriminated against in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation operated by a private entity on the basis of a disability. Public accommodations include: restaurants, hotels, doctor's offices, pharmacies, grocery stores, shopping centers, and other similar establishments.

Existing facilities must be made accessible if the changes are "readily achievable" i.e., easily accomplishable without much difficulty or expense. Auxiliary aids and services must be provided unless such provision would fundamentally alter the nature of the program or cause an undue burden. New construction and major renovations must be designed and constructed to be readily accessible to and usable by people with disabilities. Elevators need not be installed if the building has less than three stories or has less than 3,000 square feet per floor except if the building is a shopping center, shopping mall, or offices for health care providers or if the Attorney General decides that other categories of buildings require the installation of elevators.

Title III also includes specific prohibitions on discrimination in public transportation services provided by private entities, including the failure to make new over-the-road buses accessible five years from the date of enactment for large providers and six years for small providers.

The provisions of title III becomes effective 18 months after the date of enactment. Title III incorporates enforcement provisions in private actions comparable to the applicable enforcement provisions in title II of the Civil Rights Act of 1964 (injunctive relief) and provides for pattern and practice cases by the Attorney General, including authority to seek monetary damages and civil penalties.

Title IV of the ADA specifies that telephone services offered to the general public must include interstate and intrastate telecommunication relay services so that such services provide individuals who use nonvoice terminal devices because of disabilities (such as deaf persons) with opportunities for communications that are equivalent to those provided to individuals able to use voice telephone services.

Title V of the ADA includes miscellaneous provisions, including a construction clause explaining the relationship between the provisions in the ADA and the provisions in other Federal and State laws; a construction clause explaining that the ADA does not disrupt the current nature of insurance underwriting; a prohibition against retaliation; a clear statement that States are not immune from actions in Federal court for a violation of the ADA; a directive to the Architectural and Transportation Barriers Compliance Board to issue guidelines; and authority to award attorney's fees.

III. HEARINGS

Hearings were held before the Labor and Human Resources Committee and the Labor and Human Resources' Subcommittee on the Handicapped on legislation to establish a clear and comprehensive prohibition of discrimination on the basis of disability on September 27, 1988, May 9, May 10, May 16 and June 22, 1989.

On September 27, 1988, a joint hearing was held before the Subcommittee on the Handicapped and the House of Representatives' Subcommittee on Select Education on S. 2345, the Americans with Disabilities Act of 1988. Among the witnesses testifying were: Sandra Parrino, Chairperson, National Council on the Handicapped; Admiral James Watkins, Chairperson, President's Commission on the Human Immunodeficiency Virus Epidemic; Mary Linden of Morton Grove, Illinois who lived in an institution; Dan Piper, an 18-year old with Down Syndrome and Sylvia Piper of Ankeny, Iowa; Jade Calegory, a 12-year old movie actor with Spina Bifida from Corona Del Mar, California; and Lakisha Griffin from Talladega, Alabama, who attends the Alabama School for the Blind.

Also testifying were: Judith Heumann, World Institute on Disability, Berkeley, California; Gregory Hlibok, student-body president of Gallaudet University, Washington, DC; Belinda Mason from Tobinsport, Indiana who has AIDS; and W. Mitchell from Denver, Colorado, who uses a wheelchair and who was severely burned.

David Saks, on behalf of the Organization for Use of the Telephone, Baltimore, Maryland, also provided testimony.

On May 9, 1989, the Committee on Labor and Human Resources held a hearing on S. 933, the Americans with Disabilities Act of 1989. Among the witnesses were: Tony Coelho, the Majority Whip of the House of Representatives; I. King Jordan, President of Gallaudet University, Washington, DC; Justin Dart, chairperson, the Task Force on the Rights and Empowerment of Americans with Disabilities, Washington, DC.

Also testifying were: Ms. Mary DeSapio, a cancer survivor; Joseph Danowsky, an attorney who is blind; Amy Dimsdale, a college graduate who is quadriplegic and who after 5 years of looking for work remains unemployed; Harold Russell, chairman, President's Committee on Employment of People with Disabilities, Washington, DC; Zachery Fasman, U.S. Chamber of Commerce, Washington, DC; Lawrence Lorber, American Society of Personnel Administrators, Washington, DC; and Arlene Mayerson, Disability Rights Education and Defense Fund, Berkeley, California.

Others providing testimony were: Barbara Hoffman, Vice President of the National Coalition for Cancer Survivorship; Robert McGlotten, Director, Department of Legislation, AFL-CIO; the Associated General Contractors of America; and the National Organizations Responding to AIDS.

On May 10, the Subcommittee on the Handicapped heard testimony from Senator Bob Dole, Senator from Kansas and Senate Minority Leader; Perry Tillman, Paralyzed Veterans of America, New Orleans, Louisiana; Ken Tice, Advocating Change Together, Minneapolis, Minnesota; Lisa Carl who has cerebral palsy and her mother, Vickie Franke, Tacoma, Washington.

Also testifying were: the Honorable Neil Hartigan, Attorney General of the State of Illinois; Ron Mace, Barrier Free Environments, Raleigh, North Carolina; William Ball, Association of Christian Schools International, Harrisburg, Pennsylvania; Sally Douglas, National Federation of Independent Business, Washington, D.C.; Malcolm Green, National Association of Theater Owners, Boston Massachusetts; and Robert Burgdorf Jr., National Easter Seal Society, Washington, D.C.; Betty and Emory Corey, Baltimore, Maryland; and Ilene Foster, Baltimore, Maryland.

In addition, the Subcommittee heard testimony from Paul Taylor, National Technical Institute for the Deaf, Rochester, New York; Robert Yaeger, Minnesota Relay Service, Minneapolis, Minnesota; and Gerald Hines, AT&T, Basking Ridge, New Jersey.

Others providing testimony included: Chai Feldblum, Tony Califa, Nan Hunter, and Morton Halperin of the American Civil Liberties Union; Peter Bradford, chairman of the State of New York Public Service Commission; and Paul Rodgers and Caroline Chambers on behalf of the National Association of Regulatory Utility Commissioners.

On May 16, the Subcommittee on the Handicapped heard testimony from: Michael McIntyre, Queens Independent Living Center, Jamaica, New York; Mark Johnson, ADAPT, Alpharetta, Georgia; Laura Oftedahl, Columbia Lighthouse for the Blind, Washington, D.C.; and Dr. Mary Lynn Fletcher, Director, Disability Services, Loudon County, Tennessee.

Also testifying were: J. Roderick Burfield, Virginia Association of Public Transit Officials; Harold Jenkins, Cambria County Transit Authority, Johnstown, Pennsylvania; Dennis Louwerse, American Public Transit Association, Reading, Pennsylvania; Charles Webb, American Bus Association, Washington, D.C.; James Weisman, Eastern Paralyzed Veterans of America, New York, New York, and Tim Cook, National Disability Action Center, Washington, D.C.

Others providing testimony were: the Virginia Council for Independent Living; Wayne Smith, Executive Director of the United Bus Owners of America; and Theodore Knappen, Senior Vice President of Greyhound Lines, Inc.

On June 22, the Labor and Human Resources Committee heard testimony from Richard L. Thornburgh, Attorney General of the United States, and Senator Lowell P. Weicker, Jr., chief sponsor of the Americans with Disabilities Act of 1988.

IV. NEED FOR THE LEGISLATION

The Committee, after extensive review and analysis over a number of Congresses, concludes that there exists a compelling need to establish a clear and comprehensive Federal prohibition of discrimination on the basis of disability in the areas of employment in the private sector, public accommodations, public services, transportation, and telecommunications.

NATURE AND EXTENT OF DISCRIMINATION ON THE BASIS OF DISABILITY

In general

Testimony presented to the Committee and the Subcommittee, two recent reports by the National Council on Disability ("Toward Independence" (1986) and "On the Threshold of Independence" (1988)), a report by the Civil Rights Commission ("Accommodating the Spectrum of Individual Abilities" (1983)), polls taken by Louis Harris and Associates ("The ICD Survey of Disabled Americans: Bringing Disabled Americans into the Mainstream" (March, 1986)) and "The ICD Survey II: Employing Disabled Americans" (1987)), a report of the Presidential Commission on the Human Immunodeficiency Virus Epidemic (1988)), and the report by the Task Force on the Rights and Empowerment of Americans with Disabilities all reach the same fundamental conclusions:

(1) Historically, individuals with disabilities have been isolated and subjected to discrimination and such isolation and discrimination is still pervasive in our society;

(2) Discrimination still persists in such critical areas as employment in the private sector, public accommodations, public services, transportation, and telecommunications;

(3) Current Federal and State laws are inadequate to address the discrimination faced by people with disabilities in these critical areas;

(4) People with disabilities as a group occupy an inferior status socially, economically, vocationally, and educationally; and

(5) Discrimination denies people with disabilities the opportunity to compete on an equal basis and costs the United States, State and local governments, and the private sector billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

One of the most debilitating forms of discrimination is segregation imposed by others. Timothy Cook of the National Disability Action Center testified:

> As Rosa Parks taught us, and as the Supreme Court ruled thirty-five years ago in *Brown* v. *Board of Education,* segregation "affects one's heart and mind in ways that may never be undone. Separate but equal is inherently unequal."

Discrimination also includes exclusion, or denial of benefits, services, or other opportunities that are as effective and meaningful as those provided to others.

Discrimination results from actions or inactions that discriminate by effect as well as by intent or design. Discrimination also includes harms resulting from the construction of transportation, architectural, and communication barriers and the adoption or application of standards and criteria and practices and procedures based on thoughtlessness or indifference—of benign neglect.

The testimony presented by Judith Heumann, World Institute on Disability, illustrates several of these forms of discrimination:

> When I was 5 my mother proudly pushed my wheelchair to our local public school, where I was promptly refused admission because the principal ruled that I was a fire hazard. I was forced to go into home instruction, receiving one hour of education trice a week for 3½ years. My entrance into mainstream society was blocked by discrimination and segregation. Segregation was not only on an institutional level but also acted as an obstruction to social integration. As a teenager, I could not travel with my friends on the bus because it was not accessible. At my graduation from high school, the principal attempted to prevent me from accepting an award in a ceremony on stage simply because I was in a wheelchair.
>
> When I was 19, the house mother of my college dormitory refused me admission into the form because I was in a wheelchair and needed assistance. When I was 21 years old, I was denied an elementary school teaching credential because of "paralysis of both lower extremities sequelae of poliomyelitis." At the time, I did not know what sequelae meant. I went to the dictionary and looked it up and found out that it was "because of." So it was obviously because of my disability that I was discriminated against.
>
> At the age of 25, I was told to leave a plane on my return trip to my job here in the U.S. Senate because I was flying without an attendant. In 1981, an attempt was made to forceably remove me and another disabled friend from an auction house because we were "disgusting to look at." In 1983, a manager at a movie theater attempted to keep my disabled friend and myself out of his theater because we could not transfer out of our wheelchairs.

Discrimination also includes harms affecting individuals with a history of disability, and those regarded by others as having a disability as well as persons associated with such individuals that are based on false presumptions, generalizations, misperceptions, patronizing attitudes, ignorance, irrational fears, and pernicious mythologies.

Discrimination also includes the effects a person's disability may have on others. For example, in March, 1988 the Washington Post reported the story of a New Jersey zoo keeper who refused to admit children with Downs Syndrome because he feared they would upset the chimpanzees. The Supreme Court in *Alexander* v. *Choate,* 469 U.S. 287 (1985) cited as an example of improper discrimination on the basis of handicap a case in which "a court ruled that a cerebral palsied child, who was not a physical threat and was academically competitive, should be excluded from public school, because his teacher claimed his physical appearance 'produced a nauseating effect' on his classmates." 117 Cong Rec. 45974 (1971).

The Supreme Court in *School Board of Nassau County* v. *Arline,* 107 S. Ct. 1123 (1987) cited remarks of Senator Mondale describing a case in which a woman "crippled by arthritis" was denied a job *not* because she could not do the work but because "college trustees [thought] 'normal students shouldn't see her.'" 118 Cong Rec. 36761 (1972).

The Committee heard testimony about a woman from Kentucky who was fired from the job she had held for a number of years because the employer found out that her son, who had become ill with AIDS, had moved into her house so she could care for him. The Committee also heard testimony about former cancer victims, persons with epilepsy, a person with cerebral palsy, and others who had been subjected to similar types of discrimination.

With respect to the pervasiveness of discrimination in our Nation, the National Council explained:

> A major obstacle to achieving the societal goals of equal opportunity and full participation of individuals with disabilities is the problem of discrimination * * * The severity and pervasiveness of discrimination against people with disabilities is well documented.

The U.S. Commission on Civil Rights recently concluded that:

> Despite some improvements * * * [discrimination] persists in such critical areas as education, employment, institutionalization, medical treatment, involuntary sterilization, architectural barriers, and transportation.

The Commission further observed that "discriminatory treatment of handicapped persons can occur in almost every aspect of their lives."

The Lou Harris polls found that:

> By almost any definition, Americans with disabilities are uniquely underprivileged and disadvantaged. They are much poorer, much less well educated and have much less social life, have fewer amenities and have a lower level of self-satisfaction than other Americans.

Admiral James Watkins, former chairperson of the President's Commission on the Human Immunodeficiency Virus Epidemic, testified that after 45 days of public hearings and site visits, the Commission concluded that discrimination against individuals with HIV infection is widespread and has serious repercussions for both the individual who experiences it and for this Nation's efforts to control the epidemic. The Report concludes:

> as long as discrimination occurs, and no strong national policy with rapid and effective remedies against discrimination is established, individuals who are infected with HIV will be reluctant to come forward for testing, counseling, and care. This fear of potential discrimination * * * will undermine our efforts to contain the HIV epidemic and will leave HIV-infected individuals isolated and alone.

Justin Dart, the chairperson of the Task Force on the Rights and Empowerment of Americans with Disabilities, testified that after 63 public forums held in every state, there is overwhelming evidence that:

> Although America has recorded great progress in the area of disability during the past few decades, our society is still infected by the ancient, now almost subconscious assumption that people with disabilities are less than fully

> human and therefore are not fully eligible for the opportunities, services, and support systems which are available to other people as a matter of right. The result is massive, society-wide discrimination.

The U.S. Attorney General, Dick Thornburgh, on behalf of President Bush, testified that:

> Despite the best efforts of all levels of government and the private sector and the tireless efforts of concerned citizens and advocates everywhere, many persons with disabilities in this Nation still lead their lives in an intolerable state of isolation and dependence.

Employment

Individuals with disabilities experience staggering levels of unemployment and poverty. According to a recent Lou Harris poll not working is perhaps the truest definition of what it means to be disabled in America. Two-thirds of all disabled Americans between the age of 16 and 64 are not working at all; yet, a large majority of those not working say that they want to work. Sixty-six percent of working-age disabled persons, who are not working, say that they would like to have a job. Translated into absolute terms, this means that about 8.2 million people with disabilities want to work but cannot find a job.

Forty percent of all adults with disabilities did not finish high school—three times more than non-disabled individuals. In 1984, fifty percent of all adults with disabilities had household incomes of $15,000 or less. Among non-disabled persons, only twenty-five percent had household incomes in this wage bracket.

President Bush has stated: "The statistics consistently demonstrate that disabled people are the poorest, least educated and largest minority in America."

According to the Lou Harris poll, the majority of those individuals with disabilities not working and out of the labor force, must depend on insurance payments or government benefits for support. Eighty-two percent of people with disabilities said they would give up their government benefits in favor of a full-time job.

Lou Harris' poll also found that large majorities of top managers (72 percent), equal opportunity officers (76 percent), and department heads/line managers (80 percent) believe that individuals with disabilities often encounter job discrimination from employers and that discrimination by employers remains an inexcusable barrier to increased employment of disabled people.

According to testimony presented to the Committee by Arlene Mayerson of the Disabilities Rights Education and Defense Fund, the major categories of job discrimination faced by people with disabilties include: use of standards and criteria that have the effect of denying opportunities; failure to provide or make available reasonable accommodations; refusal to hire based on presumptions, stereotypes and myths about job performance, safety, insurance costs, absenteeism, and acceptance by co-workers; placement into dead-end jobs; under-employment and lack of promotion opportunities; and use of application forms and other pre-employment inquiries that inquire about the existence of a disability rather than about the ability to perform the essential functions of a job.

Several witnesses also explained that title I of the ADA (employment discrimination) is modeled after regulations implementing the Rehabilitation Act of 1973, which prohibits discrimination by recipients of Federal assistance and requires affirmative action by Federal contractors and that compliance with these laws has been "no big deal."

Harold Russell, the chairperson of the President's Committee on Employment of People With Disabilities, testified that for a majority of employees, for example, no reasonable accommodation is required; for many others the costs can be less than $50. According to the President's Committee which operates the Job Accommodation Network, typical accommodations provided for under $50 include:

A timer costing $26.95 with an indicator light allowed a medical technician who was deaf to perform the laboratory tests required for her job;

A receptionist who was visually impaired was provided with a light probe, costing $45, which allowed her to determine which lines on a telephone were ringing, on hold, or in use of her company;

Obtaining a headset for a phone costing $49.95 allowed an insurance salesperson with cerebral palsy to write while talking.

Witnesses also explained that there will also be a need for more expensive accommodations, including readers for blind persons and interpreters for deaf persons. But even costs for these accommodations are frequently exaggerated. Dr. I. King Jordan, President of Gallaudet University, explained to the Committee:

> Often, interpreters can be hired to do other things as well as interpret—administrative secretaries or professional staff, even, who interpret on an only-as-needed basis. Most of the time, people who are hired who are deaf function without an interpreter except when they are in a meeting or except when they are attending a workshop or except when there is a very essential need for one-to-one communication. But, I think it needs to be made clear to people that the accommodations are not nearly as large as some people would lead us to believe.

In sum, testimony indicates that the provision of all types of reasonable accommodations is essential to accomplishing the critical goal of this legislation—to allow individuals with disabilities to be part of the economic mainstream of our society.

Public accommodations

Based on testimony presented at the hearings and recent national surveys and reports, it is clear that an overwhelming majority of individuals with disabilities lead isolated lives and do not frequent places of public accommodation.

The National Council on Disability summarized the findings of a recent Lou Harris poll:

> The survey results dealing with social life and leisure experiences paint a sobering picture of an isolated and secluded population of individuals with disabilities. The large majority of people with disabilities do not go to movies, do not go to the theater, do not go to see musical performances, and do not go to sports events. A substantial minority of persons with disabilities never go to a restaurant, never go to a grocery store, and never go to a church or synagogue * * * The extent of non-participation of individuals with disabilities in social and recreational activities in alarming.

Several witnesses addressed the obvious question "Why don't people with disabilities frequent places of public accommodations and stores as often as other Americans?" Three major reasons were given by witnesses. The first reason is that people with disabilities do not feel that they are welcome and can participate safely in such places. The second reason is fear and self-consciousness about their disability stemming from degrading experiences they or their friends with disabilities have experienced. The third reason is architectural, communication, and transportation barriers.

Former Senator Weicker testified that people with disabilities spend a lifetime "overcoming not what God wrought but what man imposed by custom and law."

Witnesses also testified about the need to define places of public accommodations to include all places open to the public, not simply restaurants, hotels, and places of entertainment (which are the types of establishments covered by title II of the Civil Rights Act of 1964) because discrimination against people with disabilities is not limited to specific categories of public accommodations. The Attorney General stated that we must bring Americans with disabilities into the mainstream of society "in other words, full participation in and access to all aspects of society."

Robert Burgdorf, Jr., currently a Professor of Law at the District of Columbia School of Law, testifying on behalf of the National Easter Seal Society, stated:

> * * * it makes no sense to bar discrimination against people with disabilities in theaters, restaurants, or places of entertainment but not in regard to such important things as doctors' offices. It makes no sense for a law to say that people with disabilities cannot be discriminated against if they want to buy a pastrami sandwich at the local deli but that they can be discriminated against next door at the pharmacy where they need to fill a prescription. There is no sense to that distinction.

Witnesses identified the major areas of discrimination that need to be addressed. The first is lack of physical access to facilities. Witnesses recognized that it is probably not feasible to require that existing facilities be completely retrofitted to be made accessible. However, it is appropriate to require modest changes. Ron Mace, an architect, described numerous inexpensive changes that could be made to make a facility accessible, including installing a permanent or portable ramp over an entrance step; installing offset hinges to widen a doorway; relocating a vending machine to clear an accessible path; and installing signage to indicate accessible routes and features within facilities.

Several witnesses also recognized that when renovations are made that affect or could affect usability, the renovations should enhance accessibility and that newly constructed buildings should be fully accessible because the additional costs for making new facilities accessible are often "negligible." According to Ron Mace, there is absolutely no reason why new buildings constructed in America cannot be barrier-free since additional cost is not the factor. He testified that the problem is that "there is right now no training provided for designers in our country on how to design for children, older people and disabled people."

Additional areas of discrimination that witnesses identified include: the imposition or application of standards or criteria that limit or exclude people with disabilities; the failure to make reasonable modifications in policies to allow participation, and a failure to provide auxiliary aids and services.

For example, Greg Hlibok and Frank Bowe testified about the need for places of public accommodations to take steps to enhance safety for persons with hearing impairments. Laura Oftedahl testified about the lack of access and unnecessary dangers visually impaired people face because of lack of simple, inexpensive auxiliary aids.

Public services

Currently, Federal law prohibits recipients of Federal assistance from discriminating against individuals with disabilities. Many agencies of State and local government receive Federal aid and thus are currently prohibited from engaging in discrimination on the basis of disability. Witnesses testified about the inequity of limiting protection based on the receipt of Federal funding. For example, Neil Hartigan, the Attorney General from Illinois, testified that:

> Under the current Federal law, the Rehabilitation Act's nondiscrimination requirements are tied to the receipt of Federal financial assistance. Unfortunately, what this translates to is total confusion for the disabled community and the inability to expect consistent treatment. Where there is no state law prohibiting discriminatory practices, two programs that are exactly alike, except for funding sources, can treat people with disabilities completely differently than others who don't have disabilities.

Mr. Hartigan also focused on the need to ensure access to polling places: "You cannot exercise one of your most basic rights as an American if the polling places are not accessible." The Committee heard about people with disabilities who were forced to vote by absentee ballot before key debates by the candidates were held.

Dr. Mary Lynn Fletcher testified that access to all public services is particularly critical in rural areas, because State and local government activities are frequently the major activities in such small towns. Since Federal aid frequently does not reach small rural towns, current law thus does not protect people with disabilities in such areas from discrimination.

Transportation

Transportation is the linchpin which enables people with disabilities to be integrated and mainstreamed into society. Timothy Cook testified that "access to transportation is the key to opening up education, employment, recreation; and other provisions of the [ADA] are meaningless unless we put together an accessible public transportation system in this country." The National Council on Disability has declared that "accessible transportation is a critical component of a national policy that promotes the self-reliance and self-sufficiency of people with disabilities."

Harold Russell, testifying for the President's Committee on Employment of People with Disabilities made the same point when he stated:

> To have less than adequate accessible public transportation services for an individual who is protected from discrimination in employment, or who has received other numerous federally funded services, is analogous to throwing an 11-foot rope to a drowning man 20 feet offshore and then proclaiming you are going more than halfway.

Witnesses also testified about the need to pursue a multi-modal approach to ensuring access for people with disabilities which provides that all new buses used for fixed routes are accessible and paratransit is made available for those who cannot use the fixed route accessible buses.

For some people with disabilities who lead or would like to lead spontaneous, independent lives integrated into the community, paratransit is often inadequate or inappropriate for the following reasons, among others: the need to make reservations in advance often conflicts with one's work schedule or interests in going out to restaurants and the like; the cost of rides when used frequently is often exorbitant; limitations on time of day and the number of days that the paratransit operates; waiting time; restrictions on use by guests and nondisabled companions who are excluded from accompanying the person with a disability; the expense to the public agency; and restrictions on eligibility placed on use by social service agencies.

However, witnesses also stressed that there are some people with disabilities who are so severely disabled that they cannot use accessible mainline transit and thus there is a need to have a paratransit system for these people.

Witnesses also addressed common myths about making mainline buses accessible. Harold Jenkins, the General Manager of the Cambria County Transit Authority in Johnstown, Pennsylvania, testified that his system is 100% accessible and operates without problem, notwithstanding hilly terrain and inclement weather, including snow, flooding, and significant extremes in temperature.

He also explained that when the decision was initially made to make the fleet 100% accessible there was fear and reluctance on the part of the disability community, the drivers, and the general public. That fear and reluctance has now disappeared. Jenkins concluded that mainline access works in his community because of the commitment by everyone to make it work. Thus, there is a need to train and educate top management, drivers, and the general public as well as the disability community.

The Committee also heard and received written testimony that the new generation of lifts are not having the maintenance problems experienced in the past and they can operate in inclement weather. The Architectural Transportation Barriers Compliance Board has reported that currently most problems with lift operation are the direct result of driver error and that lift maintenance is but one facet of a good maintenance program. Thus, transit authorities reporting problems with lifts are generally those that also report problems with general maintenance.

With respect to intercity transportation, the Committee learned about reasonably priced lifts that can be installed on buses which will enable people using wheelchairs to have access to these buses. This is particularly critical in rural areas where these buses are often the only mode of transportation that is available.

Telecommunications

Dr. I. King Jordan, President of Gallaudet University, noted to the Committee that more than 100 years ago Alexander Graham Bell invented the telephone in the hope that he could close the communication gap between deaf and hearing people. According to Dr. Jordan: "Not only did the telephone not help close the gap, but in many ways it widened it and has become one more barrier in the lives of deaf people."

Several witnesses testified about the critical need to establish relay systems which will enable hearing impaired and communication impaired persons who use telecommunication devices for the deaf (TDDs) to make calls to and receive calls from individuals using voice telephones. Dr. Jordan explained:

> The simplest task often becomes a major burden when we do not have access to the telephone: the person who wants to call a doctor for an appointment or the person who has to call his boss and tell him he cannot show up for work that day, someone at home who needs to call a plumber to fix a leak, or maybe a theatergoer who wants to make reservations or go to dinner.

Robert Yeager, who operates the Minnesota Relay Service, explained the importance of the relay this way:

> As a former relay operator myself, I have seen the difference these services can make in people's lives * * * A woman calls an ambulance when her husband has a heart attack; someone sets up a job interview and gets a job; a teenager gets their first date * * *

Dr. Jordan summed up the need for a national relay system by stating:

> The phone is a necessity, and it is a necessity for all of us, not just people who can hear * * * By requiring nationwide telephone relay service for everyone, it will help deaf people achieve a level of independence in employment

and public accommodations that is sought by other parts of the ADA.

Enforcement

Several witnesses emphasized that the rights guaranteed by the ADA are meaningless without effective enforcement provisions. Illinois Attorney General Neil Hartigan explained that:

> The whole trick is to make it more expensive to break the law than it is to keep the law. The vast majority of businesspeople want to keep the law. They just have got a bottom line they have got to meet. They can't have somebody else having an unfair competitive advantage by getting away with a discriminatory practice. That is why we need teeth in the law. That is why we put the penalties in the law and the damages in the law.

Mr. Hartigan explained that the inclusion of penalties and damages in the driving force that facilitates voluntary compliance:

> When you don't have the penalties, there is no enforcement possibilities. Right now * * * we can have traditional as well as punitive damages. We can have injunctive activity. We have got a range of weapons we can use if we have to use them. But, the fact that you've got it, the fact they know you are serious about it, keeps you from having to use it. We have 3,000 cases where we haven't had to go to court.

Summary

In sum, the unfortunate truth is that individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the ability of such individuals to participate in and contribute to society.

THE EFFECTS OF DISCRIMINATION ON INDIVIDUALS WITH DISABILITIES

Discrimination has many different effects on individuals with disabilities. Arlene Mayerson of the Disabilities Rights Education and Defense Fund testified about the nature of discrimination against people with disabilities:

> The discriminatory nature of policies and practices that exclude and segregate disabled people has been obscured by the unchallenged equation of disability with incapacity and by the gloss of "good intentions." The innate biological and physical "inferiority" of disabled people is considered self-evident. This "self-evident" proposition has served to justify the exclusion and segregation of disabled people from all aspects of life. The social consequences that have attached to being disabled often bear no relationship to the physical or mental limitations imposed by the disability. For example, being paralyzed has meant far more than

> being unable to walk—it has meant being excluded from public schools, being denied employment opportunities and being deemed an "unfit parent." These injustices co-exist with an atmosphere of charity and concern for disabled people.

Dr. I. King Jordan, the President of Gallaudet University, explained that:

> Discrimination occurs in every facet of our lives. There is not a disabled American alive today who has not experienced some form of discrimination. Of course, this has very serious consequences. It destroys healthy self-concepts and slowly erodes the human spirit. Discrimination does not belong in the lives of disabled people.

Judith Heumann explained that:

> In the past, disability has been a cause of shame. This forced acceptance of second-class citizenship has stripped us as disabled people of pride and dignity * * * This stigma scars for life.

Discrimination produces fear and reluctance to participate. Robert Burgdorf and Harold Jenkins testifed that fear of mistreatment and discrimination and the existence of architectural, transportation, and communication barriers are critical reasons why individuals with disabilities don't participate to the same extent as nondisabled people in public accommodations and transportation.

Dr. Mary Lynn Fletcher testifed about the factors that isolate people with disabilities and then explained that when one adds the rural factor on top of everthing else it "obliterates the person."

Discrimination results in social isolation and in some cases suicide.

Justin Dart testifed before the Committee about how several of his brothers had committed suicide because of their disabilities and about a California woman, a mother, a TV director before becoming disabled who said to him:

> We can go just so long constantly reaching dead ends. I am broke, degraded, and angry, have attempted suicide three times. I know hundreds. Most of us try, but which way and where can we go? What and who can we be? If I were understood, I would have something to live for.

THE EFFECTS OF DISCRIMINATION ON SOCIETY

The Committee also heard testimony and reviewed reports concluding that discrimination results in dependency on social welfare programs that cost the taxpayers unnecessary billions of dollars each year. Sandy Parrino, the chairperson of the National Council on Disability, testified that discrimination places people with disabilities in chains that:

> * * * bind many of the 36 million people into a bondage of unjust, unwanted dependency on families, charity, and social welfare. Dependency that is a major and totally unnecessary contributor to public deficits and private expenditures.

She added that:

> * * * it is contrary to sound principles of fiscal responsibility to spend billions of Federal tax dollars to relegate people with disabilities to positions of dependency upon public support.

President Bush has stated:

> On the cost side, the National Council on the Handicapped states that current spending on disability benefits and programs exceeds $60 billion annually. Excluding the millions of disabled who want to work from the employment ranks costs society literally billions of dollars annually in support payments and lost income tax revenues.

Attorney General Thornburgh added that:

> We must recognize that passing comprehensive civil rights legislation protecting persons with disabilities will have direct and tangible benefits for our country * * * Certainly, the elimination of employment discrimination and the mainstreaming of persons with disabilities will result in more persons with disabilities working, in increased earnings, in less dependence on the Social Security system for financial support, in increased spending on consumer goods, and increased tax revenues.

Justin Dart testified that it is discrimination and segregation that are preventing persons with disabilities from becoming self-reliant:

> * * * and that are driving us inevitably towards an economic and moral disaster of giant, paternalistic welfare bureaucracy. We are already paying unaffordable and rapidly escalating billions in public and private funds to maintain ever-increasing millions of potentially productive Americans in unjust, unwanted dependency.

Thus, discrimination makes people with disabilities dependent on social welfare programs rather than allowing them to be taxpayers and consumers.

Discrimination also deprives our Nation of a valuable source of labor in a period of labor shortages in certain jobs.

President Bush has stated:

> The United States is now beginning to face labor shortages as the baby boomers move through the work force. The disabled offer a pool of talented workers whom we simply cannot afford to ignore, especially in connection with the high tech growth industries of the future.

Jay Rochlin, the executive director of the President's Committee on Employment of People with Disabilities, has stated:

> The demographics have given us an unprecedented 20 year window of opportunity. Employers will be desperate to find qualified employees. Of necessity, they will have to look beyond their traditional sources of personnel and work to attract minorities, women, and others for a new

> workforce. Our challenge is to insure that the largest minority, people with disabilities, is included.

Discrimination also negates the billions of dollars we invest each year to educate our children and youth with disabilities and train and rehabilitate adults with disabilities. Dr. I. King Jordan testified that:

> We must stop sending disabled youth conflicting signals. America makes substantial investments in the education and development of these young people, then we deny them the opportunity to succeed and to graduate into a world that treats them with dignity and respect.

Sylvia Piper, a parent of a child with developmental disabilities testified that:

> We have invested in Dan's future. And the Ankeny Public School District has made an investment in Dan's future. * * * Are we going to allow this investment of time, energy, and dollars, not to mention Dan's ability and quality of life, to cease when he reaches 21?

Attorney General Thornburgh made the same point in his testimony:

> The continued maintenance of these barriers imposes staggering economic and social costs and inhibits our sincere and substantial Federal commitment to the education, rehabilitation, and employment of persons with disabilities. The elimination of these barriers will enable society to benefit from the skills and talents of persons with disabilities and will enable persons with disabilities to lead more productive lives.

CURRENT FEDERAL AND STATE LAWS ARE INADEQUATE; NEED FOR COMPREHENSIVE FEDERAL LEGISLATION

State laws are inadequate to address the pervasive problems of discrimination that people with disabilities are facing. As Neil Hartigan, testified,

> This is a crucial area where the Federal Government can act to establish uniform minimum requirements for accessibility.

Admiral Watkins, testified that:

> My predecessor [Sandy Parrino] here this morning said enough time has, in my opinion, been given to the States to legislate what is right. Too many States, for whatever reason, still perpetuate confusion. It is time for Federal action.

According to Harold Russell:

> The fifty State Governors' Committees, with whom the President's Committee works, report that existing State laws do not adequately counter such acts of discrimination.

Current Federal law is also inadequate. Currently, Federal antidiscrimination laws only address discrimination by Federal agencies and recipients of Federal financial assistance. Last year, Congress amended the Fair Housing Act to prohibit discrimination against people with disabilities. However, there are still no protections against discrimination by employers in the private sector, by places of public accommodation, by State and local government agencies that do not receive Federal aid, and with respect to the provision of telecommunication services. With respect to the provision of accessible transportation services, there are still misinterpretations by executive agencies and some courts regarding transportation by public entities and lack of protection against private transportation companies.

The need to enact omnibus civil rights legislation for individuals with disabilities was one of the major recommendations of the National Council on Disability in its two most recent reports to Congress. In fact S. 2345, the Americans With Disabilities Act of 1988, introduced during the 100th Congress, was developed by the Council.

The need for omnibus civil rights legislation was also one of the major recommendations of the Presidential Commission on the HIV Epidemic:

> Comprehensive Federal anti-discrimination legislation, which prohibits discrimination against persons with disabilities in the public and private sectors, including employment, housing, public accommodations and participation in government programs should be enacted. All persons with symptomatic or asymptomatic HIV infection should be clearly included as persons with disabilities who are covered by the anti-discrimination protections of this legislation.

Attorney General Thornburgh, on behalf of President Bush, also testified about the importance of enacting comprehensive civil rights legislation for people with disabilities:

> The Committee is to be commended for its efforts in drafting S. 933. One of its most impressive strengths is its comprehensive character. Over the last 20 years, civil rights laws protecting disabled persons have been enacted in piecemeal fashion. Thus, existing Federal laws are like a patchwork quilt in need of repair. There are holes in the fabric, serious gaps in coverage that leave persons with disabilities without adequate civil rights protections.

VISION FOR THE FUTURE

Many of the witnesses described the vision of the Americans With Disabilities Act.

Sandy Parrino testified that:

> Martin Luther King had a dream. We have a vision. Dr. King dreamed of an America "where a person is judged not by the color of his skin, but by the content of his character." ADA's vision is of an America where persons are judged by their abilities and not on the basis of their disabilities.

Tony Coelho shared the following observation with the Committee:

> While the charity model once represented a step forward in the treatment of persons with handicaps, in today's society it is irrelevant, inappropriate and a great disservice. Our model must change. Disabled people are sometimes impatient, and sometimes angry, but for good reason—they are fed up with discrimination and exclusion, tired of denial, and are eager to seize the challenges and opportunities as quickly as the rest of us.

Dr. Jordan testified that the ADA is necessary to demonstrate that disabled people:

> Can have the same aspirations and dreams as other American citizens. Disabled people know that their dreams can be fulfilled.

Dr. Jordan also testified that passage of ADA:

> Will tell disabled Americans that they are indeed equal to other Americans and that discrimination toward disabled persons will no longer be tolerated in our country. It will also make a powerful statement to the world that America is true to its ideals. That is the full measure of the American dream.

Perry Tillman, a Vietnam veteran, testified that:

> I did my job when I was called on by my country. Now it is your job and the job of everyone in Congress to make sure that when I lost the use of my legs I didn't lose my ability to achieve my dreams. Myself and other veterans before me fought for freedom for all Americans. But when I came home and found out that what I fought for applied to everyone but me and other handicapped people, I couldn't stop fighting. I have fought since my injury in Vietnam to regain my rightful place in society. I ask that you now join me in ending this fight and give quick and favorable consideration to the ADA in order to allow all Americans, disabled or not, to take part equally in American life.

CONCLUSION

In conclusion, there is a compelling need to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities and for the integration of persons with disabillities into the economic and social mainstream of American life. Further, there is a need to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities. Finally, there is a need to ensure that the Federal Government plays a central role in enforcing these standards on behalf of individuals with disabilities.

The difficult task before the Committee and, indeed, the Congress, is to establish standards that fulfill this mandate in a clear, balanced, and reasonable manner. The Committee believes that this legislation has done that. This report explains in detail how that balance has been struck.

V. SUMMARY OF COMMITTEE ACTION

S. 933 was brought for markup at the Committee on Labor and Human Resources executive session on August 2, 1989. At that time, the Committee discussed three amendments, of which two were adopted. Senator Harkin offered an amendment in the nature of a substitute, which included amendment No. 541, proposed by Senator McCain concerning amending the substitute by adding a provision concerning technical assistance, which was adopted by voice vote. Senator Hatch offered and then withdrew an amendment that would have extended the scope of coverage to include the Congress.

The Committee voted to adopt and report S. 933, as amended, as an amendment in the nature of a complete substitute, by a roll call vote of 16–0.

VI. EXPLANATION OF THE LEGISLATION

DEFINITION OF THE TERM "DISABILITY"

Section 3(2) of the legislation defines the term "disability" for purposes of this legislation. The definition of the term "disability" included in the bill is comparable to the definition of the term "individual with handicaps" in section 7(8)(B) of the Rehabilitation Act of 1973 and section 802(h) of the Fair Housing Act.

It is the Committee's intent that the analysis of the term "individual with handicaps" by the Department of Health, Education, and Welfare of the regulations implementing section 504 (42 Fed. Reg. 22685 et. seq. (May 4, 1977)) and the analysis by the Department of Housing and Urban Development of the regulations implementing the Fair Housing Amendments Act of 1988 apply to the definition of the term "disability" included in this legislation.

The use of the term "disability" instead of "handicap" and the term "individual with a disability" instead of "individual with handicaps" represents an effort by the Committee to make use of up-to-date, currently accepted terminology. In regard to this legislation, as well as in other contexts, the Congress has been apprised of the fact that to many individuals with disabilities the terminology applied to them is a very significant and sensitive issue.

As with racial and ethnic epithets, the choice of terms to apply to a person with a disability is overlaid with stereotypes, patronizing attitudes, and other emotional connotations. Many individuals with disabilities and organizations representing them object to the use of such terms as "handicapped person" or "the handicapped." In recent legislation, Congress has begun to recognize this shift of terminology, e.g., by changing the name of the National Council on the Handicapped to the National Council on Disability.

The Committee concluded that it was important for the current legislation to use terminology most in line with the sensibilities of most Americans with disabilities. No change in definition or substance is intended nor should be attributed to this change in phraseology.

The term "disability" means, with respect to an individual—

(1) A physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(2) A record of such impairment; or

(3) Being regarded as having such an impairment.

The first prong of the definition includes any individual who has a "physical or mental impairment." A physical or mental impairment means—(1) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or (2) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

It is not possible to include in the legislation a list of all the specific conditions, diseases, or infections that would constitute physical or mental impairments because of the difficulty of ensuring the comprehensiveness of such a list, particularly in light of the fact that new disorders may develop in the future. The term includes, however, such conditions, diseases and infections as: orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular distrophy, multiple sclerosis, infection with the Human Immunodeficiency Virus, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, drug addiction, and alcoholism.

The term "physical or mental impairment" does not include simple physical characteristics, such as blue eyes or black hair. Further, because only physical or mental impairments are included, environmental, cultural, and economic disadvantages are not in themselves covered. For example, having a prison record does not constitute having a disability. Age is not a disability, nor is homosexuality. Of course, if a person who has any of these characteristics also has a physical or mental impairment, such as epilepsy, the person may be considered as having a disability or purposes of this legislation.

A physical or mental impairment does not constitute a disability under the first prong of the definition for purposes of the ADA unless its severity is such that it results in a "substantial limitation of one or more major life activities." A "major life activity" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

For example, a person who is paraplegic will have a substantial difficulty in the major life activity of walking; a deaf person will have a substantial difficulty in hearing aural communications; and a person with lung disease will have a substantial limitation in the major life activity of breathing. As noted by the U.S. Department of Justice, "Application of Section 504 of the Rehabilitation Act to HIV-Infected Individuals," September 27, 1988, at 9–11, a person infected with the Human Immunodeficiency Virus is covered under the first prong of the definition of the term "disability."

Persons with minor, trivial impairments, such as a simple infected finger are not impaired in a major life activity. A person is considered an individual with a disability for purposes of the first prong of the definition when the individual's important life activities are restricted as to the conditions, manner, or duration under which they can be performed in comparison to most people. A person who can walk for 10 miles continuously is not substantially limited in walking merely because on the eleventh mile, he or she begins to experience pain because most people would not be able to walk eleven miles without experiencing some discomfort. Moreover, whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids.

The second prong of the definition of the term "disability" includes an individual who has a record of such an impairment, i.e., an individual who has a history of, or has been misclassified as having, a mental or physical impairment that substantially limtis one or more major life activities.

This provision is included in the definition in part to protect individuals who have recovered from a physical or mental impairment which previously substantially limited them, in a major life activity. Discrimination on the basis of such a past impairment would be prohibited under this legislation. Frequently occurring examples of the first group (i.e., those who have a history of an impairment) are persons with histories of mental or emotional illness, heart disease, or cancer; examples of the second group (i.e., those who have been misclassified as having an impairment) are persons who have been misclassified as mentally retarded.

The third prong of the definition includes an individual who is regarded as having a covered impairment. This third prong includes an individual who has a physical or mental impairment that does not substantially limit major life activities, but that is treated by a covered entity as constituting such a limitation. The third prong also includes an individual who has a physical or mental impairment that substantially limits major activities only as a result of the attitudes of others toward such impairment or has no physical or mental impairment but is treated by a covered entity as having such an impairment.

The rationale for this third prong was clearly articulated by the U.S. Supreme Court in *School Board of Nassau County* v. *Arline,* 480 U.S. 273 (1987). The Court noted that Congress included this third prong because it was as concerned about the effect of an impairment on others as it was about its effect on the individual. As the Court noted, the third prong of the definition is designed to protect individuals who have impairments that do not in fact substantially limit their functioning. The Court explained:

> Such an impairment might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment. 480 U.S. at 283.

The Court went on to conclude that:

> By amending the definition of "handicapped individual" to include not only those who are actually physically impaired but also those who are regarded as impaired and who, as a result, are substantially limited in a major life activity, Congress acknowledged that society's accumulated myths and fears about disability and diseases are as handicapping as are the physical limitations that flow from actual impairment.

This third prong is particularly important for individuals with stigmatic conditions that are viewed as physical impairments but do not in fact result in a substantial limitation of a major life activity. For example, severe burn victims often face discrimination.

Another important goal of the third prong of the definition is to ensure that persons with medical conditions that are under control, and that therefore do not currently limit major life activities, are not discriminated against on the basis of their medical conditions. For example, individuals with controlled diabetes or epilepsy are often denied jobs for which they are qualified. Such denials are the result of negative attitudes and misinformation.

Other examples of individuals who fall within the "regarded as" prong of the definition include people who are rejected for a particular job for which they apply because of findings of a back abnormality on an x-ray, notwithstanding the absence of any symptoms, or people who are rejected for a particular job solely because they wear hearing aids, even though such people may compensate substantially for their hearing impairments by using their aids, speechreading, and a variety of other strategies.

A person who is excluded from any activity covered under this Act or is otherwise discriminated against because of a covered entity's negative attitudes towards disability is being treated as having a disability which affects a major life activity. For example, if a public accommodation, such as a restaurant, refused entry to a person with cerebral palsy because of that person's physical appearance, that person would be covered under the third prong of the definition. Similarly, if an employer refuses to hire someone because of a fear of the "negative reactions" of others to the individual, or because of the employer's perception that the applicant had a disability which prevented that person from working, that person would be covered under the third prong. See, e.g., *Arline,* 480 U.S. at 284; *Doe* v. *Centinela Hospital,* 57 U.S.L.W. 2034, No. CV-87-2514-PAR (C.D.Cal., June 30, 1988), *Thornhill* v. *Marsh,* 49 FEP Cases 6 (Feb. 2, 1989) (9th Cir. 1989).

TITLE I—EMPLOYMENT

Title I of the legislation sets forth prohibitions against discrimination on the basis of disability by employers, employment agencies, labor organizations, or joint labor-management committees (hereinafter referred to as "covered entities") with respect to hiring and all terms, conditions, and privileges of employment.

Scope of coverage

The bill covers employers (including governments, governmental agencies, and political subdivisions) who are engaged in an industry affecting commerce and who have 15 or more employees for each working day in each of 20 or more calender weeks in the current or preceding calendar year and any agent of such a person; except, for the two years following the effective date of title I, only entities with 25 or more employees are covered. Additional entities covered by title I of the legislation are employment agencies, labor organizations, or joint labor-management committees.

Consistent with title VII of the Civil Rights Act of 1964, the term "employer" under this legislation does not include (i) the United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or (ii) a bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of the Internal Revenue Code of 1986.

Definitions

Several of the definitions set out in title VII of the Civil Rights Act of 1964 are adopted or incorporated by reference in this legislation (Commission, employer, person, labor organization, employment agency, commerce, and industry affecting commerce). The term "employee" means an individual employed by an employer. The exception set out in title VII of the Civil Rights Act of 1964 for elected officials and their employees and appointees has been deleted.

Actions covered by this legislation

Section 102(a) of the legislation specifies that no covered entity shall discriminate against any qualified individual with a disability because of such individual's disability in regard to job application procedures, the hiring or discharge of employees, employee compensation, advancement, job training, and other terms, conditions, and privileges of employment.

The phrasing of this section is consistent with regulations implementing section 504 of the Rehabilitation Act of 1973. Consistent with these regulations, the phrase "other terms, conditions, and privileges of employment" includes: (1) recruitment, advertising, and the processing of applications for employment; (2) hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff, and rehiring; (3) rates of pay or any other form of compensation and changes in compensation; (4) job assignment, job classification, organizational structures, position descriptions, lines of progression, and seniority lists; (5) leaves of absence, sick leave, or any other leave; (6) fringe benefits available by virtue of employment, whether or not adminsitered by the covered entity; (7) selection and financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, and selection for leaves of absence to pursue training; and (8) employer-sponsored activities, including social or recreational programs.

Qualified individual with a disability

The term "qualified individual with a disability" is defined in section 101(7) of the bill to mean an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.

This definition is comparable to the definition used in regulations implementing section 501 and section 504 of the Rehabilitation Act of 1973. The phrase "essential functions" means job tasks that are fundamental and not marginal. The point of including this phrase within the definition of a "qualified individual with a disability" is to ensure that employers can continue to require that all applicants and employees, including those with disabilities, are able to perform the essential, i.e., non-marginal functions of the job in question.

As the 1977 regulations issued by the Department of Health, Education, and Welfare pointed out "inclusion of this phrase is useful in emphasizing that handicapped persons should not be disqualified simply because they may have difficulty in performing tasks that bear only a marginal relationship to a particular job." 42 Fed. Reg. 22686 (1977). In determining what constitutes the essential functions of the job, consideration should be given to the employer's judgment regarding what functions are essential as a matter of business necessity.

The basic concept is that an employer may require that every employee be qualified to perform the essential functions of a job. The term "qualified" refers to whether the individual is qualified at the time of the job action in question; the mere possibility of future incapacity does not by itself render the person not qualified.

By including the phrase "qualified individual with a disability," the Committee intends to reaffirm that this legislation does not undermine an employer's ability to choose and maintain qualified workers. This legislation simply provides that employment decisions must not have the purpose of effect of subjecting a qualified individual with a disability to discrimination on the basis of his or her disability.

Thus, under this legislation an employer is still free to select the most qualified applicant available and to make decisions based on reasons unrelated to the existence or consequence of a disability. For example, suppose an employer has an opening for a typist and two persons apply for the job, one being an individual with a disability who types 50 words per minute and the other being an individual without a disability who types 75 words per minute, the employer is permitted to choose the applicant with the higher typing speed.

On the other hand, if the two applicants are an individual with a hearing impairment who requires a telephone headset with an amplifier and an individual without a disability, both of whom have the same typing speed, the employer is not permitted to choose the individual without a disability because of the need to provide the needed reasonable accommodation.

In the above example, the employer would be permitted to reject the applicant with a disability and choose the other applicant for reasons not related to the disability or the accommodation or otherwise prohibited by this legislation. In other words, the employer's obligation is to consider applicants and make decisions without regard to an individual's disability, or the individual's need for reasonable accommodation. But, the employer has no obligation under this legislation to prefer applicants with disabilities over other applicants on the basis of disability.

Under this legislation an employer may still devise physical and other job criteria and tests for a job so long as the criteria or tests are job-related and consistent with business necessity. Thus, for example, an employer can adopt a physical criterion that an applicant be able to lift fifty pounds, if that ability is necessary to an individual's ability to perform the essential functions of the job in question.

Moreover, even if the criterion is legitimate, the employer must determine whether a reasonable accommodation would enable the person with the disability to perform the essential functions of the job without imposing an undue hardship on the business.

Finally, this legislation prohibits use of a blanket rule excluding people with certain disabilities except in the very limited situation where in all cases physical condition by its very nature would prevent the person with a disability from performing the essential functions of the job, even with reasonable accommodations.

It is also acceptable to deny employment to an applicant or to fire an employee with a disability on the basis that the individual poses a direct threat to the health or safety of others or poses a direct threat to property. The determination that an individual with a disability will pose a safety threat to others must be made on a case-by-case basis and not be based on generalizations, misperceptions, ignorance, irrational fears, patronizing attitudes, or pernicious mythologies.

The employer must identify the specific risk that the individual with a disability would pose. The standard to be used in determining whether there is a direct threat is whether the person poses a significant risk to the safety of others or to property, not a speculative or remote risk, and that no reasonable accommodation is available that can remove the risk. (See section 102(b) of the legislation). See also *School Board of Nassau County* v. *Arline,* 480 U.S. 273 (1987). For people with mental disabilities, the employer must identify the specific behavior on the part of the individual that would pose the anticipated direct threat.

Making such a determination requires a fact-specific individualized inquiry resulting in a "well-informed judgment grounded in a careful and open-minded weighing of the risks and alternatives." *Hall* v. *U.S. Postal Service,* 857 F.2d 1073, 1079 (6th Cir. 1988), quoting *Arline.* See also *Mantolete* v. *Bolger,* 757 F.2d 1416 (9th Cir. 1985) and *Strathie* v. *Dept. of Transportation,* 716 F.2d 227 (3d Cir. 1983).

With respect to covered entities subject to rules promulgated by the Department of Transportation regarding physical qualifications for drivers of certain classifications of motor vehicles, it is the Committee's intent that a person with a disability applying for or currently holding a job subject to these standards must be able to satisfy these physical qualification standards in order to be considered a qualified individual with a disability under title I of this legislation.

In light of this legislation, the Committee expects that within two years from the date of enactment (the effective date of title I of this legislation), the Secretary of Transportation will undertake a thorough review of these regulations to ascertain whether the standards conform with current knowledge about the capabilties of persons with disabilities and currently available technological aids and devices and in light of section 504 of the Rehabilitation Act of 1973 and make any necessary changes within the two year period.

Specific forms of discrimination prohibited

As explained above, section 1029a) of the bill includes a general prohibition against discrimination on the basis of disability against a qualified individual with a disability. Section 102(b) of the bill specifies specific forms of discrimination that are prohibited by section 102(a).

Section 102(b)(1) of the legislation specifies that the term "discrimination" includes limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee.

Thus, covered entities are required to make employment decisions based on facts applicable to individual applicants or employees, and not on the basis of presumptions as to what a class of individuals with disabilities can or cannot do.

For example, it would be a violation of this legislation if an employer were to limit the duties of an individual with a disability based on a presumption of what was best for such individual or based on a presumption about the ability of that individual to perform certain tasks. Similarly, it would be a violation for an employer to adopt separate lines of progression for employees with disabilities based on a presumption that no individual with a disability would be interested in moving into a particular job.

It would also be a violation to deny employment to an applicant based on generalized fears about the safety of the applicant or higher rates of absenteeism. By definition, such fears are based on averages and group-based predictions. This legislation requires individualized assessments which are incompatible with such an approach. Moreover, even group-based fears may be erroneous. In 1973, a study examined the job performance, safety record and attendance of 1,452 physically impaired employees of the E.I. du Pont de Nemours and Company (Wolfe, "Disability is No Hardship for du Pont").

The study was intended, in part, to determine the validity of several concerns expressed by employers with regard to hiring veterans with disabilities: (1) insurance rates will skyrocket; (2) considerable expense will be involved in making the necessary adjustments at the place of work; (3) safety records will be jeopardized; (4) special privileges will have to be granted; and (5) other employees may not accept workers with disabilities.

A du Pont executive said:

> Every one of these reasons for not considering the handicapped veteran is not only a myth—but has been proven through experience to hold no semblance of fact whatsoever.

Regarding insurance, the executive added

> Du Pont has had no increase in compensation costs as a result of hiring the handicapped and no lost-time injuries of the handicapped have been experienced.

With regard to the other concerns, the study showed that the disabled worker performed as well as or better than their non-disabled co-workers. The fears of safety and absenteeism were unfounded.

Some specific findings of the study were as follows:

> Ninety-one percent of Du Pont's disabled workers rated average or better in performance.
>
> Only four percent of the workers with disabilities were below average in safety records; more than half were above average.
>
> Ninety-three percent of the workers with disabilities rated average or better with regard to job stability (turnover rate).
>
> Seventy-nine percent of the workers with disabilities rated average or better in attendance.
>
> Fellow employees did not resent necessary accommodations made for employees with disabilities.

In addition, employers may not deny health insurance coverage completely to an individual based on the person's diagnosis or disability. For example, while it is permissible for an employer to offer insurance policies that limit coverage for certain procedures or treatments, e.g., only a specified amount per year for mental health coverage, a person who has a mental health condition may not be denied coverage for other conditions such as for a broken leg or for heart surgery because of the existence of the mental health condition. A limitation may be placed on reimbursements for a procedure or the types of drugs or procedures covered e.g., a limit on the number of x-rays or non-coverage of experimental drugs or procedures; but, that limitation must apply to persons with or without disabilities. All people with disabilities must have equal access to the health insurance coverage that is provided by the employer to all employees.

The ADA does not, however, affect pre-existing condition clauses included in insurance policies offered by employers. Thus, employers may continue to offer policies that contain pre-existing condition exclusions, even though such exclusions adversely affect people with disabilities, so long as such clauses are not used as a subterfuge to evade the purposes of this legislation.

For additional explanations of the treatment of insurance under this legislation, see the discussion in the report on insurance under title V of the legislation.

Section 102(b)(2) of the legislation specifies that "discrimination" includes participating in a contractual or other arrangement or relationship that has the effect of subjecting a qualified applicant or employee with a disability to the discrimination prohibited by this title. Such relationships include a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs.

Section 102(b)(3) of the legislation specified that "discrimination" includes utilizing standards, criteria, or methods of administration that have the effect of discrimination on the basis of disability or that perpetuate the discrimination of others who are subject to common administrative control.

Paragraphs (2) and (3) of the legislation are derived from provisions set out in the title I of the ADA, as originally introduced (which has been deleted by the Substitute) and general forms of discrimination set out in regulations implementing section 504 of the Rehabilitation Act of 1973 (see e.g., 45 CFR Part 84). Thus, the Substitute should not be construed as departing in any way from the concepts included in the original "general prohibitions" title of the ADA and these concepts are subsumed within the provision of the subsequent titles of the legislation. Further, this legislation in no way is intended to diminish the continued viability of sheltered workshops and programs implementing the Javits-Wagner O'Day Act.

Subparagraphs (B) and (C) incorporate a disparate impact standard to ensure that the legislative mandate to end discrimination does not ring hollow. This standard is consistent with the interpretation of section 504 by the U.S. Supreme Court in *Alexander* v. *Choate,* 469 U.S. 287 (1985). The Court explained that members of Congress made numerous statements during passage of section 504 regarding eliminating architectural barriers, providing access to transportation, and eliminating discriminatory effects of job qualification procedures. The Court then noted:

> These statements would ring hollow if the resulting legislation could not rectify the harms resulting from action that discriminated by effect as well as by design.

The Court also noted, however, that section 504 was not intended to require that a "Handicapped Impact Statement" be prepared by a covered entity before any action was taken that might conceivably affect people with disabilities. Thus, the Court rejected "the boundless notion that all disparate-impact showings constitute prima facie cases under section 504."

Section 101(b)(4) of the legislation specifies that "discrimination" includes excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association.

Thus, assume for example that an applicant applies for a job and discloses to the employer that his or her spouse has a disability. The employer believes the applicant is the most qualified person for the job. The employer, however, assuming without foundation that the applicant will have to miss work or frequently leave work early or both, in order to care for his or her spouse, declines to hire the individual for such reasons. Such a refusal is prohibited by this subparagraph.

In contrast, assume that the employer hires the applicant. If he or she violates a neutral employer policy concerning the attendance or tardiness, he or she may be dismissed even if the reason for the absence or tardiness is to care for the spouse. The employer need not provide any accommodation to the nondisabled employee.

Section 102(b)(5) of the legislation specifies that discrimination includes the failure by a covered entity to make reasonable accommodations to the known physicial or mental limitations of a qualified individual with a disability who is an applicant or employee, unless such entity can demonstrate that the accommodation would impose an undue hardship on the operation of its business.

The duty to make reasonable accommodations applies to all employment decisions, not simply to hiring and promotion decisions. This duty has been included as a form of non-discrimination on the basis of disability for almost fifteen years under section 501 and section 504 of the Rehabilitation Act of 1973 and under the nondiscrimination section of the regulations implementing section 503 of that Act.

The term "reasonable accommodation" is defined in section 101(8) of the legislation. The definition includes illustrations of accommodations that may be required in appropriate circumstances. The list is not meant to be exhaustive; rather, it is intended to provide general guidance about the nature of the obligation. Furthermore, the list is not meant to suggest that employers must follow all of the actions listed in each particular case. Rather, the decision as to what reasonable accommodation is appropriate is one which must be determined based on the particular facts of the individual case. This fact-specific case-by-case approach to providing reasonable accommodations is generally consistent with interpretations of this phrase under sections 501, 503, and 504 of the Rehabilitation Act of 1973.

The first illustration of a reasonable accommodation included in the legislation is making existing facilities used by employees in general, readily accessible to and usable by individuals with disabilities.

The legislation also specifies, as examples of reasonable accommodation, job restructuring, part-time or modified work schedules and reassignment to a vacant position.

Job restructuring means modifying a job so that a person with a disability can perform the essential functions of the position. Barriers to performance may be eliminated by eliminating nonessential elements; redelegating assignments; exchanging assignments with another employee; and redesigning procedures for task accomplishment.

Part-time or modified work schedules can be a no-cost way of accommodation. Some people with disabilities are denied employment opportunities because they cannot work a standard schedule. For example, persons who need medical treatment may benefit from flexible or adjusted work schedules. A person with epilepsy may require constant shifts rather than rotation from day to night shifts. Other persons who may require modified work schedules are persons with mobility impairments who depend on a public transportation system that is not currently fully accessible. Allowing constant shifts or modified work schedules are examples of means to accommodate the individual with a disability to allow him or her to do the same job as a nondisabled person. This legislation does not entitle the individual with a disability to more paid leave time than non-disabled employees.

Reasonable accommodation may also include reassignment to a vacant position. If an employee, because of disability, can no longer perform the essential functions of the job that she or he has held, a transfer to another vacant job for which the person is qualified may prevent the employee from being out of work and the employer from losing a valuable worker.

Reassignment as a reasonable accommodation is not available to applicants for employment. The Committee believes that efforts should be made to accommodate an employee in the position that he or she was hired to fill before reassignment should be considered. The Committee also wishes to make clear that reassignment need only be to a vacant position—"bumping" another employee out of a position to create a vacancy is not required.

The section 504 regulations provide that "a recipient's obligation to comply with this subpart [employment] is not affected by any inconsistent term of any collective bargaining agreement to which it is a party." 45 CFR 84.11(c). This policy also applies to the ADA. An employer cannot use a collective bargaining agreement to accomplish what it otherwise would be prohibited from doing under this legislation. For example, a collective bargaining agreement that contained physical criteria which caused a disparate impact on individuals with disabilities and were not job-related and consistent with business necessity could be challenged under this legislation.

The collective bargaining agreement could be relevant, however, in determining whether a given accommodation is reasonable. For example, if a collective bargaining agreement reserves certain jobs for employees with a given amount of seniority, it may be considered as a factor in determining whether it is a reasonable accommodation to assign an employee with a disability without seniority to that job.

In other situations, the relevant question would be whether the collective bargaining agreement articulates legitimate business criteria. For example, if the collective bargaining agreement includes job duties, it may be taken into account as a factor in determining whether a given task is an essential function of the job.

Conflicts between provisions of a collective bargaining agreement and an employer's duty to provide reasonable accommodations may be avoided by ensuring that agreements negotiated after the effective date of this title contain a provision permitting the employer to take all actions necessary to comply with this legislation.

Additional forms of reasonable accommodation included in the legislation are acquisition or modification of equipment or devices. The Job Accommodation Network operated by the President's Committee on Employment of People with Disabilities reports that it is possible to accommodate many employees with relatively simple and inexpensive assistive technology.

For blind and visually-impaired persons, this may include adaptive hardware and software for computers, electronic visual aids, braille devices, talking calculators, magnifiers, audio recordings and brailled material.

For persons with hearing impairments, this may include telephone handset amplifiers, telephones compatible with hearing aids, and telecommunication devices for deaf persons. For persons with limited physical dexterity, this may include goose neck telephone headsets, mechanical page turners, and raised or lowered furniture.

The Committee wishes to make it clear that non job-related personal use items such as hearing aids and eyeglasses are not included in this provision.

The legislation also lists appropriate adjustment or modifications of examinations, training materials or policies. For example, many employers have a policy that in order to qualify for a job an employee must have a driver's license—even though the jobs do not involve driving. The employer may believe that someone who drives will be on time for work or may be able to do an occasional errand. This requirement, however, would be marginal and should not be used to exclude persons with disabilities who can do the essential functions of the job that admittedly do not include driving.

The Committee wishes to emphasize again that this legislation does not require an employer to make any modification, adjustment, or change in a job description or policy that an employer can demonstrate would fundamentally alter the essential functions of the job in question.

The legislation also explicitly includes provision of qualified readers of interpreters as examples of reasonable accommodations. As with readers and interpreters, the provision of an attendant to assist a person with a disability during parts of the workday may be a reasonable accommodation depending on the circumstances of the individual case. Attendants may, for example, be required for traveling and other job-related functions. This issue must be dealt with on a case-by-case basis to determine whether an undue hardship is created by providing attendants.

The Committee wishes to clarify the employer's obligation to notify the applicant and the employee of its obligation to provide a reasonable accommodation, who is entitled to an accommodation, when the duty to provide a reasonable accommodation is triggered, and the process of determining the appropriate accommodation.

First, pursuant to section 104 of the legislation, the employer must notify applicants and employees of its obligation under this legislation to make reasonable accommodations.

Second, section 102(b)(5) of the legislation requires that reasonable accommodation be made for "a qualified individual who is an applicant or employee * * *" The term "qualified" as used in this section does not refer to the definition of "qualified individual with a disability" set forth in section 101(7) because such an interpretation would be circular and meaningless. Rather, as in section 504 regulations, the term "qualified" in section 102(b)(5) means "otherwise qualified" (See 45 CFR 84.12(a)), i.e., a person with a disability who meets all of an employer's job-related selection criteria except such criteria he or she cannot meet because of a disability.

For example, if a law firm requires that all incoming lawyers have graduated from an accredited law school and have passed the bar examination, the law firm need not provide an accommodation to an individual with a disability who has not met these selection criteria. That individual is not yet eligible for a reasonable accommodation because he or she is not otherwise qualified for the position.

On the other hand, if the individual graduated from an accredited law school and passed a bar examination (assuming that these are the only selection criteria) the person is "otherwise qualified" and the law firm would be required to provide a reasonable accommodation to the employee's visual impairment, such as a reader, that would enable the employee to perform the essential functions of the job as an attorney unless the necessary accommodation would impose an undue hardship.

If, to continue the example, a part-time reader can be provided as a reasonable accommodation that permits the individual to perform the essential functions of the attorney position without imposing an undue hardship, the person is a "qualified individual with a disability" as defined in section 101(7) of the legislation and it would be unlawful not to hire the individual because of his or her visual impairment.

Third, the legislation clearly states that employers are obligated to make reasonable accommodations only to the "known" physical or mental limitations of a qualified individual with a disability. Thus, the duty to accommodate is generally triggered by a request from an employee or applicant for employment. Of course, if a person with a known disability is having difficulty performing his or her job, it would be permissible for the employer to discuss the possibility of a reasonable accommodation with an employee.

In the absence of a request, it would be inappropriate to provide an accommodation, especially where it could impact adversely on the individual. For example, it would be unlawful to transfer unilaterally a person with HIV infection from a job as a teacher to a job where such person has no contact with people. See, e.g., *Chalk v. United States District Court,* 840 F.2nd 701 (9th Cir. 1988).

The Committee believes that the reasonable accommodation requirement is best understood as a process in which barriers to a particular individual's equal employment opportunity are removed. The accommodation process focuses on the needs of a particular individual in relation to problems in performance of a particular job because of a physical or mental impairment. A problem-solving approach should be used to identify the particular tasks or aspects of the work environment that limit performance and to identify possible accommodations that will result in a meaningful equal opportunity for the individual with a disability.

The Committee suggests that, after a request for an accommodation has been made, employers first will consult with and involve the individual with a disability in deciding on the appropriate accommodation. The Committee recognizes that people with disabilities may have a lifetime of experience identifying ways to accomplish tasks differently in many different circumstances. Frequently, therefore, the person with a disability will know exactly what accommodation he or she will need to perform successfully in a particular job. And, just as frequently, the employee or applicant's suggested accommodation is simpler and less expensive than the accommodation the employer might have devised, resulting in the employer and the employee mutually benefiting from the consultation.

The Committee also recognizes that there are times when the appropriate accommodation is not obvious to the employer or applicant because such individual is not familiar in detail with the manner in which the job in question is performed and the employer is not familiar enough with the individual's disability to identify the appropriate accommodation. In such circumstances, the Committee believes the employer should consider four informal steps to identify and provide an appropriate accommodation.

The first informal step is to identify barriers to equal opportunity. This includes identifying and distinguishing between essential and nonessential job tasks and aspects of the work environment of the relevant position(s). With the cooperation of the person with a disability, the employer must also identify the abilities and limitations of the individual with a disability for whom the accommodation is being provided. The employer then should identify job tasks or work environment that limit the individual's effectiveness or prevent performance.

Having identified the barriers to job performance caused by the disability, the second informal step is to identify possible accommodations. As noted above, the search for possible accommodations must begin with consulting the individual with a disability. Other resources to consult include the appropriate State Vocational Rehabilitation Services agency, the Job Accommodation Network operated by the President's Committee on Employment of People With Disabilities, or other employers.

Having identified one or more possible accommodations, the third informal step is to assess the reasonableness of each in terms of effectiveness and equal opportunity. A reasonable accommodation should be effective for the employee. Factors to be considered include the reliability of the accommodation and whether it can be provided in a timely manner.

The Committee believes strongly that a reasonable accommodation should provide a meaningful equal employment opportunity. Meaningful equal employment opportunity means an opportunity to attain the same level of performance as is available to non-disabled employees having similar skills and abilities.

The final informal step is to implement the accommodation that is most appropriate for the employee and the employer and that does not impose an undue hardship on the employer's operation or to permit the employee to provide his or her own accommodation if it does impose an undue hardship. In situations where there are two effective accommodations, the employer may choose the accommodation that is less expensive or easier for the employer to implement as long as the selected accommodation provides meaningful equal employment opportunity.

The expressed choice of the applicant or employee shall be given primary consideration unless another effective accommodation exists that would provide a meaningful equal employment opportunity or that the accommodation requested would pose an undue hardship.

The Committee wishes to note that many individuals with disabilities do not require any reasonable accommodation whatsoever. The only change that needs to be made for such individuals is a change in attitude regarding employment of people with disabilities.

The term "undue hardship" is defined in section 101(9) to mean an action requiring significant difficulty or expense i.e., an action that is unduly costly, extensive, substantial, disruptive, or that will fundamentally alter the nature of the program. In determining whether a particular accommodation would impose an undue hardship on the operation of the covered entity's business i.e., require significant difficulty or expense, factors to be considered include: (1) the overall size of the business of the covered entity with respect to number of employees, number and type of facilities and size of the budget; (2) the type of operation maintained by the covered entity, including the composition and structure of the entity's workforce; and (3) the nature and cost of the accommodation needed.

This provision is derived from and should be applied consistently with interpretations by Federal agencies applying the term set forth in regulations implementing sections 501 and 504 of the Rehabilitation Act of 1973.

The weight given to each factor in making the determination as to whether a reasonable accommodation nonetheless constitutes an "undue hardship" will vary depending on the facts of a particular situation and turns on both the nature and cost of the accommodation in relation to the employer's resources and operations. In explaining the "undue hardship" provision, the Department of Health, Education, and Welfare explained in the appendix accompanying the section 504 regulations (42 Fed. Reg. 22676 et. seq, May 4, 1977):

> Thus, a small day-care center might not be required to expend more than a nominal sum, such as that necessary to equip a telephone for use by a secretary with impaired hearing, but a large school district might be required to make available a teacher's aide to a blind applicant for a teaching job. Further, it might be considered reasonable to require a State welfare agency to accommodate a deaf employee by providing an interpreter, while it would constitute an undue hardship to impose that requirement on a provider of foster home care services.

The mere fact that an employer is a large entity for the purposes of factor (1), should not be construed to negate the importance of factors (2) and (3) in determining the existence of undue hardship.

The Committee wishes to make it clear that the principles enunciated by the Supreme Court in *TWA* v. *Hardison*, 432 U.S. 63 (1977) are not applicable to this legislation. In *Hardison*, the Supreme Court concluded that under title VII of the Civil Rights Act of 1964 an employer need not accommodate persons with religious beliefs if the accommodation would require more than a de minimus cost for the employer.

Finally, the Committee wishes to make it clear that even if there is a determination that a particular reasonable accommodation will result in undue hardship, the employer must pay for the portion of the accommodation that would not cause an undue hardship if, for example, the State Vocational Rehabilitation Agency, other similar agency, or the employee or applicant pays for the remainder of the cost of the accommodation.

Section 102(b)(6) of the legislation specifies that discrimination includes the denial of employment opportunities by a covered entity to an applicant or employee who is a qualified individual with a disability if the basis for such denial is because of the need of the individual for reasonable accommodation.

Thus, for example, where an applicant with a disability is otherwise equally qualified as an applicant without a disability, an employer cannot reject the applicant with a disability who requires a reasonable accommodation in favor of one who does not if the reason for the rejection is the reasonable accommodation requirement. Even where an employer is not required under this law to pay for a reasonable accommodation, because it would impose an undue hardship on the employer, the employer cannot refuse to hire an applicant where the applicant is willing to make his or her own arrangements for the provision of such an accommodation, if the reason for the rejection is the reasonable accommodation requirement.

Section 102(b)(7) of the legislation specifies that discrimination includes using employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity.

As in Section 504, the ADA adopts a framework for employment selection procedures which is designed to assure that persons with disabilities are not excluded from job opportunities unless they are actually unable to do the job. The requirement that job criteria actually measure ability required by the job is a critical protection against discrimination based on disability. As was made strikingly clear at the hearings on the ADA, stereotypes and misconceptions about the abilities, or more correctly the inabilities, of persons with disabilities are still pervasive today. Every government and private study on the issue has shown that employers disfavor hiring persons with disabilities because of stereotypes, discomfort, misconceptions, and unfounded fears about increased costs and decreased productivity.

The three pivotal provisions to assure a fit between job criteria and an applicant's actual ability to do the job are:

(1) The requirement that persons with disabilities not be disqualified because of the inability to perform non-essential or marginal functions of the job;

(2) The requirement that any selection criteria that screen out or tend to screen out be job-related and consistent with business necessity; and

(3) The requirement to provide resonable accommodation to assist persons with disabilties to meet legitimate criteria.

These three legal requirements, which are incorporated in sections 102(b)(5) and (7) of the legislation, work together to provide a high degree of protection to eliminate the current pervasive bias against employing persons with disabilities in the selection process.

The interrelationship of these requirements in the selection procedure is as follows. If a person with a disability applies for a job and meets all selection criteria except one that he or she cannot meet because of a disability, the criteria must concern an essential, non-marginal aspect of the job, and be carefully tailored to measure the person's actual ability to do an essential function of the job. If the criteria meets this test, it is nondiscriminatory on its face and it is otherwise lawful under the legislation. However, the criteria may not be used to exclude an applicant with a disability if the criteria can be satisfied by the applicant with a reasonable accommodation. A reasonable accommodation may entail adopting an alternative, less discriminatory criterion.

For example, in *Stutts* v. *Freeman,* 694 F2d 666 (11th Cir. 1983), Mr. Stutts, who was dyslexic, was denied the job of heavy equipment operator because he could not pass a written test used by the employer for entering the training program, which was a prerequisite for the job. The written test had a disparate impact on persons with dyslexia. The questions, therefore, were whether both the written test for admission to the training program and the reading requirements of the training program itself, were necessary criteria for the heavy equipment operator job. If the answers to both those questions were yes, the question then became whether a reasonable accommodation could enable the person with a disability to meet the employment criteria at issue.

In *Stutts*, the record reflected that Mr. Stutts could perform the job of heavy equipment operator. As stated by the court,

> Indeed, everyone involved in this case seems to concede that Mr. Stutts would have no problems doing the job but rather may experience difficulty with the outside reading requirements of the training program. If selected, this obstacle may be overcome by Mr. Stutts obtaining the assistance of someone to act as a "reader" * * * [T]o eliminate Mr. Stutts without implementing an alternative test (oral) administered by outside professionals of TVA's staff or by failing to adjust the entry requirements to accommodate his dyslexia, TVA has failed to comply with the statute.

Hence, the requirement that job selection procedures be "job-related and consistent with business necessity" underscores the need to examine all selection criteria to assure that they not only provide an accurate measure of an applicant's actual ability to perform the job, but that even if they do provide such a measure, a disabled applicant is offered a "reasonable accommodation" to meet the criteria that relate to the essential functions of the job at issue. It is critical that paternalistic concerns for the disabled person's own safety not be used to disqualify an otherwise qualified applicant. As noted, these requirements are incorporated in the legislation in sections 102(b)(1)(5) and (7).

The Committee intends that the burden of proof under each of the aforementioned sections be construed in the same manner in which parallel agency provisions are construed under Section 504 of the Rehabilitation Act as of June 4, 1989. See, e.g., 45 C.F.R. 84.13 (Department of Health and Human Services); 29 C.F.R. 1613.705 (Equal Employment Opportunity Commission); 28 C.F.R. 42.512 (Department of Justice); 29 C.F.R. 32.14 (Department of Labor).

Section 102(b)(8) of the legislation specifies that discrimination includes failing to select and administer tests so as best to ensure that, when the test is administered to an applicant or employee with a disability that impairs sensory, manual, or speaking skills, the tests results accurately reflect the individual's job skills, aptitude, or whatever other factor the test purports to measure, rather than reflecting the individual's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure).

Section 102(c) of the legislation specifies that the prohibition against discrimination in section 101(a) applies to medical examinations and inquiries. Historically, employment application forms and employment interviews requested information concerning an applicant's physical or mental condition. This information was often used to exclude applicants with disabilities—particularly those with so-called hidden disabilities such as epilepsy, diabetes, emotional illness, heart disease and cancer—before their ability to perform the job was even evaluated.

In order to assure that misconceptions do not bias the employment selection process, the legislation sets forth a process which begins with the prohibition to pre-offer medical examinations or inquiries. The process established by the legislation parallels the regulations issued under section 504 of the Rehabilitation Act of 1973.

The legislation prohibits any identification of a disability by inquiry or examination at the pre-offer stage. Employers may ask questions which relate to the ability to perform job-related functions, but may not ask questions in terms of disability. For example, an employer may ask whether the applicant has a driver's license, if driving is an essential job function, but may not ask whether the applicant has a visual disability. This prohibition against inquiries regarding disability is critical to assure that bias does not enter the selection process.

The only exception to making medical inquiries that are not strictly job-related is narrow. The legislation allows covered entities to require post-offer medical examinations so long as they are given to all entering employees in a particular category, the results of the examinations are kept confidential, and the results are not used to discriminate against individuals with disabilities unless such results makes the individual not qualified for the job. For example, an entity can test all police officers rather than all city employees or all construction workers rather than all construction company employees. This exception to the general rule meets the employer's need to discover possible disabilities that do limit the person's ability to do the job, i.e., those that are job-related.

Once an employee is on the job, the actual performance on the job is, of course, the best measure of ability to do the job. When a need arises to question the continued ability of a person to do the job, the employer may make disability inquiries, including medical exams, which are job-related and consistent with business necessity. The concept of "job-related and consistent with business necessity" has been outlined elsewhere in the report under the discussion of section 102(b)(7) of the legislation.

An inquiry or medical examination that is not job-related serves no legitimate employer purpose, but simply serves to stigmatize the person with a disability. For example, if an employee starts to lose a significant amount of hair, the employer should not be able to require the person to be tested for cancer unless such testing is job-related. Testimony before the Committee indicated there still exists widespread irrational prejudice against persons with cancer. While the employer might argue that it does not intend to penalize the individual, the individual with cancer may object merely to being identified, independent of the consequences. As was abundantly clear before the Committee, being identified as disabled often carries both blatant and subtle stigma. An employer's legitimate needs will be met by allowing the medical inquiries and examinations which are job-related.

Consistent with the section in the legisalation pertaining to preemployment inquiries, it is the Committee's intent that a covered entity may invite applicants for employment to indicate whether and to what extent they have a disability under the following circumstances only: (1) when a covered entity is taking remedial action to correct the effects of past discrimination, (2) when a recipient is taking voluntary action to overcome the effects of conditions that resulted in limited employment opportunities, or (3) when a recipient is taking affirmative action pursuant to section 503 of the Rehabilitation Act of 1973, provided that:

(a) The covered entity states clearly on any written questionnaire used for this purpose or makes clear orally (if no written questionnaire is used) that the information requested is intended for use solely in connection with its remedial action obligations or its voluntary or affirmative action efforts, and

(b) The covered entity states clearly that the information is being requested on a voluntary basis, that it will be kept confidential, that refusal to provide it will not subject the applicant or employee to any adverse treatment, and that it will be used only in accordance with this title of the Act.

Defenses

Section 103(a) of the legislation specifies that in general, it may be a defense to a charge of discrimination that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation.

With respect to contagious diseases or infections, section 103(b) of the legislation specifies that the term "qualification standards" may include a requirement that an individual with a currently contagious disease or infection shall not pose a direct threat to the health or safety of other individuals in the workplace. Under this qualification standard, for a person with a currently contagious disease or infection to constitute a direct threat to the health or safety of others, the person must pose a significant risk of transmitting the infection to others in the workplace which cannot be eliminated by reasonable accommodation. See *School Board of Nassau County* v. *Arline,* 480 U.S. 273, 287, note 16.

With respect to drug addicts and alcoholics, section 103(c)(1) of the legislation specifies that, notwithstanding any other provision of this legislation, a covered entity:

(1) May prohibit the use of alcohol or illegal drugs at the workplace by all employees;

(2) May require that employees not be under the influence of alcohol or illegal drugs at the workplace;

(3) May require that employees conform their behavior to requirements established pursuant to the Drug-Free Workplace Act of 1988, and that transportation employees meet requirements established by the Department of Transportation with respect to drugs and alcohol; and

(4) May hold a drug user or alcoholic to the same qualification standards for employment or job performance and behavior to which it holds other individuals, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such individual.

Further, section 103(c)(2) of the legislation specifies that nothing in this title shall be construed to encourage, prohibit, or authorize conducting drug testing of job applicants or employees or making employment decisions based on such test results.

With respect to the defense that transportation employers may require that transportation employees meet requirements established by the Secretary of Transportation pursuant to and consistent with Federal law, the Committee wishes to make the following clarifications.

First, licensing of motor carrier drivers and railroad engineers, and certification of airplane pilots involves consideration of drunk and drug-related driving convictions, as recorded by individual States and made available to employers through the National Drivers Register at the Department of Transportation. In addition, records of other drug or alcohol related violations of State or Federal law may be considered as indicators of "fitness for duty" for safety-sensitive transportation positions.

Second, this defense applies to violations of Department of Transportation regulations concerning drug and alcohol use outside the workplace e.g., an air crew member who, in violation of Federal Aviation Administration rules, drinks alcohol within 8 hours of going on duty.

Third, this defense applies to actions based on an individual's failure to pass DOT mandated drug and alcohol tests when administered in accordance with Federal and State laws e.g., a truck driver who tests positive for illegal drugs and the failure or refusal to take a drug test mandated by Department of Transportation regulations.

The Committee believes that test results should be accurate and encourages covered entities to follow the Mandatory Guidelines on Federal Workplace Testing as issued by the Department of Health and Human Services. In any event, testing must comply with applicable Federal, State, or local laws or regulations regarding quality control, confidentiality, and rehabilitation; provided that, with respect to transportation employees, if testing is undertaken, it must be done in compliance with applicable Federal laws and regulations.

The reasonable accommodation provision in section 102(b)(5) of this title does not affirmatively require that a covered entity must provide a rehabilitation program or an opportunity for rehabilitation for any job applicant who is a drug addict or alcoholic or for any current employee who is a drug addict or alcoholic against whom employment-related actions are taken for the reasons enumerated in section 103(c) relating to defenses.

Although the provision of a rehabilitation program or an opportunity for rehabilitation of a drug addict or alcoholic is not required by this title, the Committee strongly encourages covered entities to follow the lead of the Federal government and many private employers, consistent with the policy embedded in the Drug Free Workplace Act, to offer such rehabilitation programs or provide an opportunity for rehabilitation.

Finally, the Committee wishes to emphasize that the provisions of section 103(c) of this legislation apply only to addicts that are currently using illegal drugs or alcohol.

With respect to religious entities, section 103(d) of the legislation specifies that title I does not prohibit a religious corporation, association, educational institution, or society from giving preference in employment to individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

Because title I of this legislation incorporates by reference the definition of the term "employer" and "employee" used in title VII of the Civil Rights Act of 1964 and because of the similarity between the "religious preference" provisions in title VII and the ADA, it is the Committee's intent that title I of the ADA be interpreted in a manner consistent with title VII of the Civil Rights Act of 1964 as it applies to the employment relationship between a religious organization and those who minister on its behalf.

In addition, section 103(d) of the legislation includes a provision not included in title VII of the Civil Rights Act of 1964 which specifies that under title I of the legislation, a religious organization may require, as a qualification standard to employment, that all applicants and employees conform to the religious tenets of such organization. This exemption is modeled after the provision in title IX of the Education Amendments of 1972. Thus, is is the Committee's intent that the terms "religious organizations" and "religious tenets" be interpreted consistent with the Department of Education's regulations thereunder.

The inclusion of a "religious tenets" defense is not intended to affect in any way the scope given to section 702 of title VII of the Civil Right Act of 1964.

Posting notices

Section 104 of the legislation specifies that every employer, employment agency, labor organization, or joint labor-management committee covered under this title must post notices in an accessible format to applicants, employees, and members describing the applicable provisions of this Act, in the manner prescribed by section 711 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–10).

Regulations

Section 105 of the legislation specifies that not later than one year after the date of enactment of this Act, the Equal Employment Opportunity Commission must issue regulations in an accessible format to carry out this title in accordance with subchapter II of chapter 5 of title 5, United States Code.

It is the Committee's intent that these regulations will be drafted so as to be a self-contained document. The regulations should not incorporate by reference other laws or regulations. The Commission's regulations will have the force and effect of law.

This format will increase the likelihood of voluntray compliance on the part of covered entities and should minimize the need to hire a battery of lawyers to ascertain the obligations created by this legislation.

Enforcement

Section 106 of the legislation specifies that the remedies and procedures set forth in sections 706, 707, 709, and 710 of the Civil Rights Act of 1964 shall be available with respect to the Commission or any individual who believes that he or she is being subjected to discrimination on the basis of disability in violation of any provisions of this legislation, or regulations promulgated under section 105 concerning employmnet. As has been the case under title VII of the Civil Rights Act of 1964, the Attorney General may continue to have pattern or practice authority with respect to State and local governments.

Section 205 of S. 933, as originally introduced, provided protection to individuals who believe that they are being or who are "about to be subjected to discrimination." This provision has been deleted becasue the Committee determined that the case law under title VII of the Civil Rights Act of 1964 already provides protection against discrimination in those circumstances with which the Committee had had concerns, and thus, a specific provision in the ADA is unnecessary.

The Supreme Court enumerated the "futile gesture" doctrine under title VII: "When a person's desire for a job is not translated into a formal application solely because of his unwillingness to engage in a futile gesture he is as much a victim of discrimination as is he who goes through the motions of submitting an application." *Internatiional Brotherhood of Teamsters* v. *United States,* 431 U.S.C. 324, 365-67.

The term "is being subjected to discrimination" also includes the situation where the employee discovers that the employer is redesigning office space in such a way that it will become inaccessible to a disabled employee. In this situation, the employee should be able to stop the illegal constrution before it begins.

The Committee recognizes that this legislation's requirements are substantially different from the other statutes governing private sector employment that are enforced by the Commission. The fact that most of the Commission's current professional employees are unfamiliar with disability nondiscrimination requirements will necessitate that the Commission provide extensive training for staff.

The Committee expects the Commission will establish and implement employer training programs and otherwise provide technical assistance to employers seeking to comply with the legislation's requirements.

Effective date

Section 107 of the legislation specifies that title I shall become effective 24 months after the date of enactment.

TITLE II—PUBLIC SERVICES

Title II of the legislation has two purposes. The first purpose is to make applicable the prohibition against discrimination on the basis of disability, currently set out in regulations implementing section 504 of the Rehabilitation Act of 1973, to all programs, activities, and services provided or made available by state and local governments or instrumentalities or agencies thereto, regardless of whether or not such entities receive Federal financial assistance. Currently, section 504 prohibits discrimination only by recipients of Federal financial assistance.

The second purpose is to clarify the requirements of section 504 for public transportation entities that receive Federal aid, and to extend coverage to all public entities that provide public transportation, whether or not such entities receive Federal aid.

Extending a Federal prohibition against discrimination on the basis of disability to all State and local governmental entities

Section 202 of the legislation extends the nondiscrimination policy in section 504 of the Rehabilitation Act of 1973 to cover all State and local governmental entities. Specifically, section 202 provides that no qualified individual with a disability shall, by reason of such disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination by a department, agency, special purpose district, or other instrumentality of a State or a local government.

The forms of discrimination prohibited by section 202 are comparable to those set out in the applicable provisions of titles I and III of this legislation. It is the Committee's intent that section 202 and other sections of the legislation be interpreted consistent with *Alexander* v. *Choate,* 469 U.S. 287 (1985).

The Committee recognizes that the phrasing of section 202 in this legislation differs from section 504 by virtue of the fact that the phrase "solely by reason of his or her handicap" has been deleted. The deletion of this phrase is supported by the experience of the executive agencies charged with implementing section 504. The regulations issued by most executive agencies use the exact language set out in section 202 in lieu of the language included in the section 504 statute.

A literal reliance on the phrase "solely by reason of his or her handicap" leads to absurd results. For example, assume that an employee is black and has a disability and that he needs a reasonable accommodation that, if provided, will enable him to perform the job for which he is applying. He is the most qualified applicant. Neverthless, the employer rejects the applicant because he is black and because he has a disability.

In this case, the employer did not refuse to hire the individual solely on the basis of his handicap—the employer refused to hire him because of his disability and because he was black. Although he might have a claim of race discrimination under title VII of the

Civil Rights Act, it could be argued that he would not have a claim under section 504 because the failure to hire was not based solely on his disability and as a result he would not be entitled to a reasonable accommodation.

The Committee, by adopting the language used in regulations issued by the executive agencies, rejects the results described above. Court cases interpreting section 504 have also rejected such reasoning. As the Tenth Circuit explained in *Pushkin* v. *Regents of University of Colorado,* 658 F. 2d 1372, the fact that the covered entity lists a number of factors to rejection in addition to the disability is not dispositive. In this case, the University stated that Dr. Pushkin was rejected because of low interview scores. The court stated that "it is not possible to extricate ratings from the reactions to the handicap itself."

Morever, the interview ratings "as a general practice are not necessarily controlling in the selection process." The question was whether "the reasons articulated for the rejection other than handicap encompass unjustified consideration of the handicap itself" (Id. at 1387). As stated by the court, the "issue is whether rejecting Dr. Pushkin after expressly weighing the implication of his handicap was justified."

If the plaintiff is qualified for the position in question, a rejection which considered the disability as a factor would not be justified. The existence of non-disability related factors in the rejection decisions does not immunize employers. The entire selection procedure must be reviewed to determine if the disability was improperly considered.

As used in this title, the term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies and practices, the removal of architectural, communication, and transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a department, agency, spcial purpose district, or other instrumentality of a State or a local government.

The term "instrumentality of a state and local government" includes public transit authorities.

With regard to school bus operations by public entities, it is not the intent of this Committee to require anything different under this legislation than is currently required of school systems and other entities receiving Federal financial assistance under section 504 of the Rehabilitation Act of 1973 (e.g., 34 CFR Part 104).

Agencies of a State, or a political subdivision of a State that provide school bus transportation are required to provide bus service to children with disabilities equivalent to that provided to children without disabilities (whether provided directly or by contract or other arrangement with a private entity).

The school bus transportation provided to children with disabilities must be provided in the most integrated setting possible. This means that when a child with a disability requires transporation, the school bus that serves his/her route should be accessible. This does not mean that all school buses need to be accessible; only that equal nonsegregated opportunities are provided to all children.

School bus operations, as defined in 49 CFRT 605.3(b) and the associated revisions established in Highway Safety Program Standard No. 17, means transportation by Type I and II school bus vehicles of school children, personnel, and equipment to and from school or school-related activities.

Actions applicable to public transportation considered discriminatory

Definition

As used in title II, the term "public transportation" means transportation by bus or rail, or by any other conveyance (other than air travel) that provides the general public with general or special service (including charter service) on a regular and continuing basis, including service contracted through a private sector entity.

As used in title II, the term "public entity" includes the National Railroad Passenger Corporation.

The Committee excluded transportation by air because the Congress recently passed the Air Carrier Access Act, which was designed to address the problem of discrimination by Air Carriers and it is the Committee's expectation that regulations will be issued that reflect congressional intent. However, this title applies to the public entities' fixed facilities used in air travel, such as airport terminals, and to related services, such as ground transportation, provided by public entities.

It is not the Committee's intent to make the vehicle accessibility provisions of this title applicable to vehicles donated to a public entity. The Committee understands that it is not usual to donate vehicles to a public entity. However, there could be instances where someone could conceivably donate a bus to a public transit operator in a will. In such a case, the transit operators should not be prevented from accepting the gift.

The Committee does not intend that this limited exemption for donated vehicles be used to circumvent the intent of the ADA. For example, a local transit authority could not arrange to be the recipient of donated inaccessible buses. This would be a violation of the ADA.

As a general rule, all requirements for nondiscrimination apply not only to the design of vehicles and facilities but to their operation as well. Thus, new fixed route buses must have lifts, and new and key stations must have elevators or other means to ensure accessibility as necessary components for a transit authority to be in compliance with the provisions of this title of the legislation. Merely installing the access equipment is never sufficient by itself, however; the lifts and elevators must also operate, be in good working order, and be available when needed for access in order for an entity to be in compliance with the law.

The Committee believes that a strong commitment from a transit authority's management team will ensure nondiscrimination in the provision of transportation to people with disabilities. This includes adequate training of maintenance personnel and bus operators, sensitivity training of all personnel which stresses the importance of providing transportation, and creative marketing strategies.

New buses, rail vehicles, and other fixed route vehicles

Section 203(b)(1) of the legislation specifies that it shall be considered discrimination, for purposes of this Act and for purposes of section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), for a public entity to purchase or lease a new fixed route bus of any size, a new intercity rail vehicle, a new light rail vehicle to be used for public transportation, or any other new fixed route vehicle to be used for public transportation and for which a solicitation by such individual or entity is made later than 30 days after the date of enactment of this Act, if such bus, rail, or other vehicle is not readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

This requirement is included to ensure that an accessible transportation system is phased-in as new vehicles are purchased. It makes no sense, at this point in time, to perpertuate continued inaccessibility and to exclude persons with disabilities from the opportunity to use a key public service—transportation. Inaccessible vehicles affect more than just individuals with disabilities' ability to travel independently. It affects their ability to gain employment. When such individuals are able to depend on an accessible transportation system, one major barrier is removed which would prevent them from joining the work force. This ability ultimately affects our society as a whole. Accessible transportation also allows individuals with disabilities to enjoy cultural, recreational, commercial and other benefits that society has to offer.

Transportation affects virtually every aspect of American life. Mainline services are geared to moving people to and from work, school, stores, and other activities on schedules that reflect most people's daily routines. It is false and discriminatory to suggest that people with disabilities—who have the same needs as other community residents—are not as interested in or worthy of using transit services as people without disabilities.

The term "fixed route" means a bus system that operates on a continuing and regular basis on a fixed pattern and schedule.

The term "new" means buses which are offered for first sale or lease after manufacture without any prior use. Buses for which a solicitation is made within 30 days after enactment of this legislation are not subject to the accessibility requirement and thus are not required to have wheelchair lift equipment. However, buses that are solicited for after 30 days from enactment of this legislation are covered by the accessibility provision and would have to comply with the requirement that all newly purchased vehicles be accessible to people with disabilities including wheelchair users.

The phrase "for which a solicitation by such individual or entity is made" means when a public entity asks for bids from manufacturers to build buses or begins to offer to purchase or bid for the purchase of new buses 30 days after enactment of this legislation.

The term "readily accessible to and usable by" is a term of art that means the ability of individuals with disabilities, including individuals using wheelchairs, to enter into and exit and safely and effectively use a vehicle used for public transportation.

Lifts or ramps and other equipment, and fold-up seats or other wheelchair spaces with appropriate securement devices are among the features necessary to make transit vehicles readily accessible to and usable by individuals with disabilities. The requirement that a vehicle is to be readily accessible obviously entails that each vehicle is to have some spaces for individuals using wheelchairs or other mobility aids; how many spaces per vehicles are to be made available for wheelchairs is, however, a determination that depends upon various factors, including the number of vehicles in the fleet, the seat vacancy rates, and usage by people with disabilities.

The Committee intends, consistent with these factors, that the determination of how many spaces must be available for wheelchair use should be flexible and generally left up to the provider, provided that at least some seats on each vehicle are accessible. Technical specifications and guidance regarding lifts and ramps, wheelchair spaces, and securement devices are to be provided in the minimum guidelines and regulations to be promulgated under this legislation. These minimum guidelines should be consistent with the Committee's desire for flexibility and decisionmaking by the provider.

The Committee wishes to emphasize that the legislation uses the phrase "including individuals who use wheelchairs" because of misinterpretations of the nature and extent of obligations under section 504. The obligation to provide public transportation in a nondiscriminatory fashion applies to all persons with disabilities, including people with sensory impairments and those with cognitive impairments such as mental retardation. It is the Committee's intent that the obligation to provide lift service applies, not only to people who use wheelchairs, but also to other individuals who have difficulty in walking. For example, people who use crutches, walkers or three-wheeled mobility aids should be allowed to use a lift.

A public transit authority should develop training sessions to familiarize bus operators with the services that individuals with disabilities may need. For example, assuring that people with vision impairmants get off at the correct stop, training bus drivers how to use the lift in a bus, and developing a program which would assist people with mental retardation in how to use the transportation system. Transit authorities should also be required to have written materials available in a format accessible to people with vision impairments and to make TDD numbers available to persons with hearing and communication impairments.

Section 203(e) of the legislation provides temporary relief for public entities from the obligations under section 203(b) where lifts are unavailable. Specifically, with respect to the purchase of new buses, a public entity may apply for, and the Secretary of Transportation may temporarily relieve such entity from the obligation to purchase new buses of any size that are readily accessible to and usable by individuals with disabilities, if such public entity can demonstrate the existence of four factors:

(1) That the initial solicitation for new buses made by the public entity specified that all new buses were to be lift-equipped and were to be otherwise accessible to and usable by individuals with disabilities;

(2) The unavailability from any qualified manufacturer of hydraulic, electro-mechanical, or other lifts for such new buses;

(3) That the public entity seeking temporary relief has made good faith efforts to locate a qualified manufacturer to supply the lifts to the manufacturer of such buses in sufficient time to comply with such solicitation; and

(4) That any further delay in purchasing new buses necessary to obtain such lifts would significantly impair transportation services in the community served by the public entity.

Section 203(f) of the legislation makes it clear that any relief granted under subsection (e) must be limited in duration by a specified date. In addition, if, at any time, the Secretary of Transportation has reasonable cause to believe that such relief was fraudulently applied for, the Secretary of Transportation shall cancel such relief, if such relief is still in effect, and take other steps that he or she considers appropriate.

Further, the appropriate committees of the Congress must be notified of any such relief granted. The appropriate committees in the Senate include the Committee on Commerce, Science, and Transportation and the Committee on Labor and Human Resources.

Used vehicles

Section 203(b)(2) of the legislation specifies that if a public entity purchases or leases a used vehicle after the date of enactment of this Act, such public entity shall make demonstrated good faith efforts to purchase or lease a used vehicle that is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

The term "used vehicle" means a vehicle that was purchased before a date which is at least 30 days prior to the enactment of this legislation. Frequently small and rural communities do not purchase new buses. Many of these communities buy used buses that are less expensive than new buses in an effort to provide transportation to individuals in these areas without expending large sums of money. Purchasers of used vehicles are required by this legislation to make "demonstrated good faith efforts" to locate accessible used vehicles.

The phrase "demonstrated good faith efforts" is intended to require a nationwide search and not a search limited to a particular region. For instance, it would not be enough for a transit operator to contact only the manufacturer where the transit authority usually does business to see if there are accessible used buses. It might involve the transit authority advertising in a trade magazine, i.e., Passenger Transport, or contacting the transit trade association, American Public Transit Association (APTA), to determine whether accessible used vehicles are available.

It is the Committee's expectation that as the number of buses with lifts increases, the burden on the transit authority to demonstrate its inability to purchase accessible vehicles despite good faith efforts will become more and more difficult to satisfy.

Remanufactured vehicles

Section 203(b)(3) of the legislation specifies that if a public entity remanufacturers a vehicle, or purchases or leases a remanufactured vehicle, so as to extend its useful lift for 5 years or more, the vehicle shall, to the maximum extent feasible, be readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

The phrase "remanufactures a vehicle or purchases or leases a remanufactured vehicle so as to extend its usable life for 5 years or more" means that the vehicle is stripped to its frame and is then rebuilt. It does not simply mean an engine overhaul. The additional cost to make a remanufactured vehicle accessible would be comparable to the cost of making a new vehicle accessible. Therefore, remanufactured vehicles should be treated the same as new vehicles.

The phrase "to the maximum extent feasible" is included in order to provide clarification that the Committee does not intend to require accessibility for remanufactured vehicles if it would destroy the structural integrity of the vehicle.

Paratransit as a supplement to fixed route public transportation system

Section 203(c) of the legislation specifies that if a public entity operates a fixed route public transportation system to provide public transportation, it shall be considered discrimination, for purposes of this Act and for purpose of section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), for a public transit entity to fail to ensure the provision of paratransit or other special transporation services sufficient to provide a comparable level of services as is provided to individuals using fixed route public transporation to individuals with disabilities, including individuals who use wheelchairs, who cannot otherwise use fixed route public transporation and to other individuals associated with such individuals with disabilities in accordance with service criteria established under rqulations promulgated by the Secretary of transportation unless the public transit entity can demonstrate that the provision of paratransit or other special transportation services would impose an undue financial burden on the public transit entity.

If the provision of comparable paratransit or other special transporation services would impose an undue financial burden on the public transit entity, such entity must provide paratransit and other special transportation services to the extent that providing such services would not impose an undue financial burden on such entity.

Regulations promulgated by the Secretary of Transportation to determine what constitutes an undue financial burden may include a flexible numerical formula that incorporates appropriate local characteristics such as population. Although the legislation mentions only population as an example of local characteristics that might be reflected is such a formula, other characteristics appropriate to consider include population density, level of paratransit services currently being provided in the area, residential patterns, and the interim degree of accessibility of fixed route transit service.

Notwithstanding the above provisions, the Secretary may require, at the discretion of the Secretary, public transit authority to provide paratransit services beyond the amount determined by such formula.

It is the Committee's intent that any criteria developed by the Secretary regarding the "undue financial burden" proviso, including the use of a formula, be consistent with that portion of the *ADAPT* v. *Skinner* decision handed down on July 24, 1989 by the Third Circuit Court of Appeals (Nos. 88-1139, 88-1177, and 88-1178) concerning the three percent "safe harbor" provision (pages 38-46 of the slip opinion).

The Committee recognizes that there will always be a need for paratransit services. Paratransit services must be available to individuals who are unable to use mainline public transportation. By "unable to use" the committee means to include those individuals who cannot gain access to the public transportation systems. The reasons for this inability to access the transit system could be because of the nature and severity of the individual's physical or mental disability or because of other factors determined by the local community, such as the lack of curb cuts which would prevent individuals with certain disabilities from traveling to a bus stop.

In developing the criteria that will be used to determine which individuals with disabilities are unable to use the transportation services, it is important to significantly involve organizations representing people with disabilities and individual consumers with disabilities. The Committee wishes to make it clear that criteria developed to determine eligibility for paratransit e.g., inability to use mainline transportation services shall not be used to prevent, limit, or otherwise exclude such individuals from using mainline services if they so choose.

The term "paratransit or other special transportation services" means a transporation system that is available to those individuals who are unable to use the transportation system available to other people. This has been characteristically provided by transit authorities or contracted out to private companies and uses small buses or vans. Usually, the services is demand responsive or door-to-door service.

The Committee does not intend to require a public transit authority to actually provide paratransit or other special transportation services if such services are provided by other entities serving the same geographical location as is served by the public transit authority providing the fixed route system. However, the Committee wishes to emphasize that the paratransit or other special transportation services provided must be consistent with the requirements set out in this legislation and a public transit entity must be ultimately accountable for ensuring that the services are being provided in compliance with this legislation.

The following minimum service criteria should apply to special paratransit service systems that are used to supplement a fixed route accessible system:

a. Eligibility: All persons with disabilities unable to use the fixed route vehicles and their companions shall be eligible to use the special service.

b. Response time: The service should be provided to a person with a disability with a comparable response time that a person without a disability would receive.

c. Restrictions or priorities based on trip purpose: There shall not be priorities or restrictions based on trip purpose on users of the special service.

d. Fares: The fare for a trip charged to a user of the special service system shall be comparable to the fare for a trip of similar length, at a similar time of day, charged to a user of the fixed route service.

e. Hours and days of service: The special service shall be available throughout the same hours of days as the fixed route service.

f. Service area: The special service shall be available throughout the service area in which the fixed route service is provided. Service to points outside this service area served by extended express or commuter bus service shall be available to persons with disabilities in an accessible manner.

The term "comparable level of services" means that when all aspects of a transportation system are analyzed, equal opportunities to use the transportation system exist for all persons—individuals with and without disabilities. The essential test to meet is whether the system is providing a level of service that meets the needs of persons with and without disabilities to a comparable extent.

For instance, if a person with a disability calls for a ride on a demand response system for the general public—and an accessible bus arrives within fifteen minutes—that is equal treatment if a person without a disability has to wait for the bus for an equivalent amount of time. However, if the bus arrives and it does not have a lift and one is needed, or if a disabled person has to wait considerably more time than a non-disabled person, then equal opportunity to use the demand responsive public transportation system is not being provided.

The term "other individuals associated with such individuals with disabilities" means the companions of those individuals who cannot otherwise use fixed route bus service whether they are part of the person's family, or friends of the individual with a disability. For instance, if a father wanted to take his children to the zoo and paratransit services are the only means of transportation that father is qualified for, he should be allowed to take his children on the paratransit bus. He should not be relegated to the paratransit by himself while his children are required to take fixed route public transportation.

If a man and woman were dating and the woman could not otherwise use public fixed route transportation then they should be able to use the paratransit services to and from that date. Likewise, if an individual had out of town guests and one of the out of town guests cannot use the fixed route bus system and is qualified to use the paratransit services of the state where they are visiting, then everyone in the group should be allowed to use the paratransit service to go sightseeing.

The Committee intends that during the interim period in which substantial numbers of fixed route buses are not accessible, the public transit authorities form an advisory committee to ensure the participation of individuals with disabilities in the planning, development, and implementation stages of the transportation system. One way to do this is by instituting an advisory group. Careful consideration should be given to the composition of the advisory group and every effort should be made to have adequate representation from all elements of the disability community.

This advisory group is an essential component to the development of standards which must then appear in the authorities' transit plan. Cooperation between the disability community and the transit operators is imperative during the period of time in which the system will be in transition, from an inaccessible system to an accessible one.

The transition options chosen will depend, to a certain extent, on the system involved. Some systems will require the broadest use of the existing accessible buses. For instance, it may be advantageous for a small system to require that all the accessible buses be in service during both off-peak and peak hours and at regular intervals so as to provide some service to the most people. A larger system might choose to make key lines accessible or ensure that the feeder lines are accessible. In this way, the system will be providing meaningful transportation at least to a portion of the individuals that need the access of the system.

The mainline interim service agreed upon by the advisory Committee must be available throughout the regular service area and during the normal service hours. This service, to the extent feasible, must meet a number of criteria as to convenience and comparability to regular mainline service (e.g., no restriction as to trip purpose, wait, fares and travel time).

Regardless of the mainline accessible transportation that will be available, it is important that a paratransit service be in place to ensure adequate access in those areas where accessible mainline service cannot yet be achieved. It is equally as important to realize that paratransit will always be necessary for those individuals who for legitimate reasons are unable to use mainline accessible service.

The local transit authority must be sincere in its efforts to coordinate special services in the locality to meet the service standards. The paratransit services should meet the service criteria both during the transition phase and thereafter.

Community operating demand responsive systems for the general public

Section 203(d) of the legislation specifies that if a public entity operates a demand responsive system that is used to provide public transportation for the general public, it shall be considered discrimination, for purposes of this Act and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), for such public entity to purchase or lease a new vehicle, for which a solicitation is made later than 30 days after the date of enactment of this Act, that is not readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, unless the entity can demonstrate that such system, when viewed in its entirety, provides a level of service to individuals with disabilities equivalent to the general public.

The intent of the Committee is to provide flexibility for rural and small urban communities that only have a demand responsive system for everyone. These systems are available to people without disabilities as well as to those with disabilities. The Committee intends that the time delay between a telephone call to access the demand responsive system and the pick up of the individual is not to be greater because the individual needs a lift or ramp or other accommodation to access the vehicle.

The term "demand responsive service" means service where the individual must request transportation service before it is rendered. This fact distinguishes this type of service from fixed route service.

With fixed route service, no action is needed by an individual to initiate public transportation. If an individual is at a bus stop at the time the bus is scheduled to appear then that individual will be able to access the transportation system. With demand-responsive service, an additional step must be taken by the individual before he or she can ride the bus, i.e., the individual must make a telephone call. In this type of service, the transit provider will know ahead of time whether or not an accessible vehicle is necessary. Therefore, all demand responsive vehicles need not be accessible as long as the level of service provided to individuals with disabilities is equal to that provided to those without disabilities.

The phrase "when viewed in its entirety, provides a level of service to individuals with disabilities equivalent to the general public" means that when all aspects of a transportation system are analyzed, equal opportunities for each individual with a disability to use the transportation system must exist.

The Committee wishes to make it clear that the authority of the Secretary to grant temporary relief where lifts are unavailable applies to communities operating demand responsive as well as fixed route bus systems.

New facilities

Section 203(g) of the legislation specifies that for purposes of this Act and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), it shall be considered discrimination for a public entity to build a new facility that will be used to provide public transportation services, including bus service, intercity rail service, rapid rail service, commuter rail service, light rail service, and other service used for public transportation that is not readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

The meaning of the key phrases used in this subsection are described subsequently in the section of the report pertaining to title III of the Act.

Alterations of existing facilities

Section 203(h) of the legislation specifies that, with respect to a facility or any part thereof that is used for public transportation and that is altered by, on behalf of, or for the use of a public entity in a manner that affects or could affect the usability of the facility or part thereof, it shall be considered discrimination, for purposes of this title and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), for such individual or entity to fail to make the alterations in such a manner that, to the maximum extent feasible, the altered portion of the facility is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

If such public entity is undertaking major structural alterations that affect or could affect tthe usability of the facility (as defined under criteria established by the Secretary of Transportation) such public entity shall also make any additional alterations that are necessary to ensure that, to the maximum extent feasible, a path of travel from a primary entrance, and a reasonable number of bathrooms, telephones, and drinking fountains serve such path of travel are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

The key phrases used in this subsection are described subsequently under the section of the report concerning title III of the legislation.

Existing facilities

Section 203(i)(1) of the legislation specifies that with respect to existing facilities used for public transportation, it shall be considered discrimination, for purposes of this title and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), for a public entity to fail to operate such public transportation program or activity conducted in such facilities so that, when viewed in the entirety, it is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

This is the same standard that currently applies under section 504 regulations issued by the Department of Transportation.

The standards set out above do not apply to stations in intercity rail systems, and rapid rail, commuter rail and light rail systems. Such stations are governed by section 203(i)(3) of the legislation, which specifies that for purposes of this Act and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), it shall be considered discrimination for a public entity to fail to make stations in intercity rail systems and key stations in rapid rail, commuter rail and light rail systems readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

Intercity rail systems, including the National Railroad Passenger Corporation, must be made accessible as soon as practicable, but in no event later than 20 years after the date of enactment. Key stations in rapid rail, commuter rail, and light rail systems must be made accessible as soon as practicable but in no event later than 3 years after the date of enactment of this Act, except that the time limit may be extended by the Secretary of Transportation up to 20 years for extraordinarily expensive structural changes to, or replacement of, existing facilities necessary to achieve accessibility.

The Committee intends that the term "key stations" shall include stations that have high ridership, and stations that serve as transfer and feeder stations. The public transit authority shall develop a plan for complying with the requirement that reflects consultation with individuals with disabilities affected by such plan and that establishes milestones for achievement of this requirement.

The phrase "key stations" includes high ridership stations since individuals with disabilities have the same travel objectives as individuals without disabilities. Stations may have high ridership because they are located in business and employment districts, cultural, educational, recreational and entertainment centers, or are transfer points from other modes of transportation.

In addition to high ridership stations, "feeder stations" should be designated as "key" because they generally are located in suburban areas. Making these stations accessible will provide individuals with disabilities who live in these areas the ability to commute.

Exactly what stations will be determined "key" is a decision best left to the local community. The Committee does not intend to mandate a process to identify "key stations" except that—in developing the criteria that will be used to determine which stations will be "key"—it is important to significantly involve organizations representing people with disabilities and individual consumers with disabilities.

It is the Committee's understanding the settlement agreements recently reached in New York City specifying approximately 38 particular stations out of over 465 stations in the system and in Philadelphia where 11 out of approximately 53 stations on the high speed line and 31 out of approximately 172 commuter rail stations are to be considered "key stations" are in full compliance with the criteria and procedures set out above.

The phrase "as soon as practicable" is included in order to create an obligation to attain accessibility before the specified period of time has elapsed. It is the intent of this Committee that this requirement would prohibit a transit authoriety from delaying the installation of an elevator, if capital funds were available and the installation could otherwise be accomplished, could be just because the absolute time limit is not up.

The phrase "extraordinarily expensive structural change to or replacement of existing facilities" is intended to create a narrow exemption for the facilities where the only means of creating accessibility would be to raise the entire platform of a station or to install an elevator. The costs to accomplish these structural changes can be extremely costly.

In issuing regulations for the enforcement of this section, the Secretary of Transportation may prescribe a procedure for the resolution of disputes when a local rail transit operator and representatives of the disability community are unable to reach mutual agreement.

Intercity, rapid, light, and commuter rail systems

Section 203(i)(2) of the legislation specifies that with respect to vehicles operated by intercity, light, rapid and commuter rail systems, for purposes of this title and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), it shall be considered discrimination for a public entity to fail to have at least one car per train that is accessible to individuals with disabilities, including individuals who use wheelchairs, as soon as practicable but in any event in no less than 5 years.

It is the Committee's expectation that the regulations issued by the Secretary of Transportation will ensure that the car that is accessible stops at an appropriate place in the station that is level with the car and that signage is included to indicate where such car will stop.

Regulations

Section 204 of the legislation specifies that not later than one year after the date of enactment of this Act, the Attorney General shall promulgate regulations in an accessible format that implement this title (other than section 303), and such regulations shall be consistent with this title and with the coordination regulations under part 41 of title 28 Code of Federal Regulations (as promulgated by the Department of Health, Education, and Welfare on January 13, 1978), applicable to recipients of Federal financial assistance under section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) except, with respect to "program accessibility, existing facilities" and "communications" such regulations shall be consistent with applicable portions of regulations and analysis relating to Federally conducted activities under section 504 of the Rehabilitation Act of 1973 (part 39 of title 28 of the Code of Federal Regulations).

Section 204(b) of the legislation specifies that not later than one year after the date of enactment of this Act, the Secretary of Transportation shall promulgate regulations in an accessible format that include standards applicable to facilities and vehicles covered under section 203.

Such standards shall be consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board in accordance with section 504.

Enforcement

Section 205 of the legislation specifies that the remedies, procedures, and rights set forth in section 505 of the Rehabilitation Act of 1973 (29 U.S.C. 794a) shall be available with respect to any individual who believes that he or she is being subjected to discrimination on the basis of disability in violation of any provisions of this Act, or regulations promulgated under section 204, concerning public services.

It is the Committee's intent that enforcement of section 202 of the legislation should closely parallel the Federal government's experience with section 504 of the Rehabilitation Act of 1973. The Attorney General should use section 504 enforcement procedures and the Department's coordination role under Executive Order 12250 as models for regulation in this area.

The Committee envisions that the Department of Justice will identify appropriate Federal agencies to oversee compliance activities for State and local government. As with section 504, these Federal agencies, including the Department of Justice, will receive, investigate, and where possible, resolve complaints of discrimination. If a Federal agency is unable to resolve a complaint by voluntary means, the Federal government would use the enforcement sanctions of section 505 of the Rehabilitation Act of 1973. Because the fund termination procedures of section 505 are inapplicable to State and local government entities that do not receive Federal funds, the major enforcement sanction for the Federal government will be referral of cases by these Federal agencies to the Department of Justice.

The Department of Justice may then proceed to file suits in Federal district court. As with section 504, there is also a private right of action for persons with disabilities. Again, consistent with section 504, it is not our intent that persons with disabilities need to exhaust Federal administrative remedies before exercising the private right of action.

Effective date

In accordance with section 206 of the legislation, title II of the bill shall become effective 18 months after the date of enactment except that the provisions of the bill applicable to the purchase of new fixed route vehicles shall become effective on the date of enactment of this Act.

TITLE III—PUBLIC ACCOMMODATIONS AND SERVICES OPERATED BY PRIVATE ENTITIES

Section 504 of the Rehabilitation Act of 1973 prohibits Federal agencies and recipients of Federal financial assistance from discriminating against persons with disabilities. The purpose of title III of the legislation is to extend these general prohibitions against discrimination to privately operated public accommodations and to bring individuals with disabilities into the economic and social mainstream of American life. Title III fulfills these purposes in a clear, balanced, and reasonable manner.

Title III is not intended to govern any terms or conditions of employment by providers of public accommodations or potential places of employment; employment practices are governed by title I of this legislation.

Title III also prohibits discrimination in public transportation services provided by private entities.

Scope of coverage of public accommodations

Section 301(3) of the legislation sets forth the definition of the term "public accommodation." The following privately operated entities are considered public accommodations for purposes of title III, if the operations of such entities affect commerce:

(1) An inn, hotel, motel, or other similar place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor;

(2) A restaurant, bar, or other establishment serving food or drink;

(3) A motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;

(4) An auditorium, convention center, or lecture hall;

(5) A bakery, grocery store, clothing store, hardware store, shopping center, or other similar retail sales establishment;

(6) A laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other similar service establishment;

(7) A terminal used for public transportation;

(8) A museum, library, gallery, and other similar place of public display or collection;

(9) A park or zoo;

(10) A nursery, elementary, secondary, undergraduate, or postgraduate private school;

(11) A day care center, senior citizen center, homeless shelter, food bank, adoption program, or other similar social service center; and

(12) A gymnasium, health spa, bowling alley, golf course, or other similar place of exercise or recreation.

The twelve categories of entities included in the definition of the term "public accommodation" are exhaustive. However, within each of these categories, the legislation only lists a few examples and then, in most cases, adds the phrase "other similar" entities. The Committee intends that the "other similar" terminology should be construed liberally consistent with the intent of the legislation that people with disabilities should have equal access to the array of establishments that are available to others who do not currently have disabilities.

For example, the legislation lists "golf course" as an example under the category of "place of exercise or recreation." This does not mean that only driving ranges constitute "other similar establishments." Tennis courts, basketball courts, dance halls, playgrounds, and aerobics facilities, to name a few other entities are also included in this category. Other entities covered under this category include video arcades, swimming pools, beaches, camping areas, fishing and boating facilities, and amusement parks.

Similarly, although not expressly mentioned, bookstores, video stores, stationary stores, pet stores, computer stores, and other stores that offer merchandise for sale or rent are included as retail sales establishments.

The phrase "privately operated" is included to make it clear that establishments operated by Federal, State, and local governments are not covered by this title. Of course an establishment operated by a private entity which is otherewise covered by this title that also receives Federal, State, or local funds is still covered by this title.

Only nonresidential entities or portions of entities are covered by this title. For example, in a large hotel that has a residential apartment wing, the apartment wing would be covered by the Fair Housing Act, but not this title. The nonresidential accommodations in the rest of the hotel would be covered by this title. Although included in the definition of public accommodations, homeless shelters are subject to the provisions of this title only to the extent that they are not covered by the Fair Housing Act, as amended in 1988.

Private schools, including elementary and secondary schools, are covered by this title. The Committee does not intend, however, that compliance with this legislation requires a private school to provide a free appropriate education or develop an individualized education program in accordance with regulations implementing section 504 of the Rehabilitation Act of 1973 (34 CFR Part 104) and regulations implementing part B of the Education of the Handicapped Act (34

CFR Part 300). Of course, if a private school is under contract with a public entity to provide a free appropriate public education, it must provide such education in accordance with section 504 and part B.

The term "commerce" is defined in section 301(1) of the legislation to mean travel, trade, traffic, commerce, transportation, or communication among the several States, or between any foreign country or any territory or possession and any State or between points in the same state but through another state or foreign country.

Prohibition of discrimination by public accommodations

Section 302(a) of the legislation specifies that no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation.

"Full and equal enjoyment" does not encompass the notion that persons with disabilities must achieve the identical result or level of achievement of nondisabled persons, but does mean that persons with disabilities must be afforded equal opportunity to obtain the same result.

Section 302(b)(1) of the legislation specifies general forms of discrimination prohibited by this title. These provisions are consistent with the general prohibitions which were included in title I of S. 933, as originally introduced. As explained previously in the report, the general prohibitions title has been deleted by the Substitute.

Sections 302(b)(1)(A) (i), (ii), and (iii) of the legislation specify that it shall be discriminatory:

> To subject an individual or class of individuals on the basis of disability or disabilities of such individual or class, directly, or through contractural, licensing, or other arrangements, to a denial of the opportunity of the individual or class to participate in or beanefit from the goods, services, facilities, privileges, advantages, and accommodations of an entity;
>
> To afford such an opportunity that is not equal to that afforded other individuals; or
>
> To provide such an opportunity that is different or separate from that provided to other individuals, unless such action is necessary to provide the individual or class of individuals with an opportunity that is as effective as that provided to others.

Section 302(b)(1)(B) of the legislation specifies that goods, services, privileges, advantages, accommodations, and services shall be afforded to an individual with a disability in the most integrated setting appropriate to the needs of the individual.

Section 302(b)(1)(C) of the legislation specifies that notwithstanding the existence of separate or different programs or activities provided in accordance with this section, an individual with a disability shall not be denied the opportunity to participate in such programs or activities that are not separate or different.

Taken together, these provisions are intended to prohibit exclusion and segregation of individuals with disabilities and the denial of equal opportunities enjoyed by others based on, among other things, presumptions, patronizing attitudes, fears, and stereotypes above individuals with disabilities. Consistent with these standards, covered entities are required to make decisions based on facts applicable to individuals and not on the basis of presumptions as to what a class individuals with disabilities can or cannot do.

The Committee wishes to emphasize that these provisions should not be construed to jeopardize in any way the continued viability of separate private schools providing special education for particular categories of children with disabilities, sheltered workshops, special recreational programs, and other similar programs.

At the same time, the Committee wishes to reaffirm that individuals with disabilities cannot be denied the opportunity to participate in programs that are not separate or different. This is an important and over-arching principle of the Committee's bill. Separate, special, or different programs are designed to make participation by persons with disabilities possible. Such programs are not intended to restrict the participation of disabled persons in ways that are appropriate to them.

For example, a blind person may wish to decline participating in a special museum tour that allows persons to touch sculptures in an exhibit and instead tour the exhibit at his own pace with the museum's recorded tour. It is not the intent of this title to require the blind person to avail him or herself of the special tour. The Committee intends that modified participation for persons with disabilities be a choice but not a requirement.

In addition, it would not be a violation of this title for an establishment to offer recreational programs specially designed for children with mobility impairments. However, it would be a violation of this title if the entity then excluded such children from other recreational services made available to nondisabled children, or required children with disabilities to attend only designated programs.

Section 302(b)(1)(D) of the legislation specifies that an individual or entity shall not, directly, or through contractual or other arrangements, utilize standards or criteria or methods of administration that have the effect of discriminating on the basis of disability or that perpetuate the discrimination of others who are subject to common administrative control. This provision is identical to section 102(b)(3) of the bill, which was discussed previously in the report.

Section 302(b)(1)(E) of the legislation specifies that it shall be discriminatory to exclude or otherwise deny equal goods, services, privileges, advantages, and accommodations, or other opportunities to an individual or entity because of the known disability of an individual with whom the individual or entity is known to have a relationship or association. This provisions is comparable to section 102(b)(4) of the legislation, which was discussed previously in the report.

Section 302(b)(2) of the legislation includes specific applications of the general prohibition against discrimination in section 302(a) and the general prohibitions set out in section 302(b)(1) of the legislation. The Committee wishes to emphasize that the specific provisions contained in title III, including the exceptions and terms of limitation, control over the more general provisions in section 302(a) and section 302(b)(1) to the extent there is any apparent conflict.

Section 302(b)(2)(A)(i) of the legislation specifies that the term "discrimination" includes the imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any goods, services, facilities, privileges, advantages, and accommodations, unless such criteria can be shown to be necessary for the provision of the goods, services, facilities, privileges, advantages, or accommodations being offered.

As explained above, it is a violation of this title to exclude persons with disabilities. For example, it would be a violation for a grocery store to impose a rule that no blind persons would be allowed in the store, or for a drugstore to refuse to serve deaf people. It also would be a violation for such an establishment to invade such people's privacy by trying to identify unnecessarily the existence of a disability, as, for example, if the credit application of a department store were to inquire whether an individual has epilepsy, has ever had been hospitalized for mental illness, or has other disability.

Similarly, it can constitute a violation to impose criteria that limit the participation of people with disabilities, as for example, by requiring that individuals with Down syndrome can only be seated at the counter, but not the table-seating section of a diner.

And it would be a violation to adopt policies which impose additional requirements or burdens upon people with disabilities not applied to other persons. Thus, it would be a violation for a theater or restaurant to adopt a policy specifying that individuals who use wheelchairs must be chaperoned by an attendant.

In addition, this subsection prohibits the imposition of criteria that "tend to" screen out an individual with a disability. This concept, drawn from current regulations under Section 504 (See, e.g. 45 C.F.R. 84.13), makes it discriminatory to impose policies or criteria that, while not creating a direct bar to individuals with disabilities, diminish such individuals' chances of participation.

Such diminution of opportunity to participate can take a number of different forms. If, for example, a drugstore refuses to accept checks to pay for prescription drugs unless an individual presents a driver's license, and no other form of identification is acceptable the store is not imposing a criterion that identifies or mentions disability. But for many individuals with visual impairments, and various other disabilities, this policy will operate to deny them access to the service available to other customers; people with disabilities will be disproportionately screened out.

Section 302(b)(2)(A)(ii) of the legislation specifies that discrimination includes a failure to make reasonable modifications in policies, practices, and procedures when such modifications may be necessary to afford such goods, services, facilities, privileges, advantages, and accommodations unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, and accommodations.

For example, a physician who specializes is treating burn victims could not refuse to treat the burns of a deaf person because of his or her deafness. However, such a physician need not treat the deaf individual if he or she does not have burns nor need the physician provide other types of medical treatment to individuals with disabilities unless he or she provides other types of medical treatment to nondisabled invididuals.

Thus, nothing in this legislation is intended to prohibit a physician from providing the most appropriate medical treatment in the physician's judgment or from referring an individual with a disability to another physician when the physician would make such a referral of an individual who does not have a disability.

Similarly, a drug rehabilitation clinic could refuse to treat a person who was not a drug addict but could not refuse to treat a person who was a drug addict simply because the patient tests positive for HIV.

A public accommodation which does not allow dogs must modify that rule for a blind person with a seeing-eye dog, a deaf person with a hearing ear dog, or a person with some other disability who uses a service dog.

Section 302(b)(2)(A)(iii) of the legislation specifies that discrimination includes a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the goods, services, facilities, advantages, and accommodations being offered or would result in an undue burden.

The phrase "undue burden" is the limit applied under the ADA upon the duty of places of public accommodation to provide auxiliary aids and services. It is analogous to the phrase "undue hardship" used in the employment title of ADA (see previous discussion in the report) and is derived from section 504 and regulations thereunder. The determination of whether the provision of an auxiliary aid or service imposes an undue burden on a business will be made on a case-by-case basis, taking into account the same factors used for purposes of determinng "undue hardship."

The fact that the provision of any particular auxiliary aid would result in a undue burden does not relieve the business from the duty to furnish an alternative auxiliary aid, if available, that would not result in such a burden.

The term "auxiliary aids and services" is defined in section 3(1) of the legislation. The definition includes illustrations of aids and services that may be provided. The list is not meant to be exhaustive; rather, it is intended to provide general guidance about the nature of the obligation.

The Committee expects that the covered entity will consult with the individual with a disability before providing a particular auxiliary aid or service. Frequently, an individual with a disability requires a simple adjustment or aid rather than an expensive or elaborate modification often envisioned by a covered entity.

For example, auxiliary aids and services for blind persons include both readers and the provision of brailled documents (see below). A restaurant would not be required to provide menus in braille if it provided a waiter or other person who was willing to read the menu. Similarly, a bookstore need not braille its price tags, stock brailled books, or lower all its shelves so that a person who uses a wheelchair can reach all the books. Rather, a salesperson can tell the blind person how much an item costs, make a special order of brailled books, and reach the books that are out of the reach of the person who uses a wheelchair.

The legislation specifies that auxiliary aids and services includes qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments. Other effective methods may include: telephone handset amplifiers, telephones compatible with hearing aids, telecommunication devices for the deaf, closed captions, and decoders.

For example, it would be appropriate for regulations issued by the Attorney General to require hotels of a certain size to have decoders for closed captions available or, where televisions are centrally controlled by the hotel, to have a master decoder.

It is also the Committee's expectation that regulations issued by the Attorney General will include guidelines as to when public accommodations are required to make available portable telecommunication devices for the deaf. In this regard, it is the Committee's intent that hotels and other similar establishments that offer nondisabled individuals the opportunity to make outgoing calls, on more than an incidental convenience basis, to provide a similar opportunity for hearing impaired customers and customers with communication disorders to make such outgoing calls by making available a portable telecommunication device for the deaf.

It is not the Committee's intent that individual retail stores, doctors' offices, restaurants or similar establishments must have telecommunications devices for the deaf since people with hearing impairments will be able to make inquiries, appointments, or reservations with such establishments through the relay system established pursuant to title IV of the legislation, and the presence of a public telephone in these types of establishments for outgoing calls is incidental.

Open-captioning, for example, of feature films playing in movie theaters, is not required by this legislation. Filmmakers are, however, encouraged to produce and distribute open-captioned versions of films and theaters are encouraged to have at least some preannounced screenings of a captioned version of feature films.

Places of public accommodations that provide film and slide shows to impart information are required to make such information accessible to people with disabilities.

The legislation also specifies that auxiliary aids and services includes qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments. Additional examples of effective methods of making visually delivered materials available include: audio recordings and the provision of brailled and large print materials.

The legislation specifies that auxiliary aids and services includes the acquisition or modification of equipment or devices. For example, a museum that provides audio cassettes and cassette players for an audio-guided tour of the museum may need to add brailled adhesive labels to the buttons on a select number of the tape-players so that they can be operated by a blind person.

The Committee wishes to make it clear that technological advances can be expected to further enhance options for making meaningful and effective opportunities available to individuals with disabilities. Such advances may enable covered entities to provide auxiliary aids and services which today might be considered to impose undue burdens on such entities.

Section 302(b)(2)(A)(iv) of the legislation specifies that discrimination includes a failure to remove architectural barriers and communication barriers that are structural in nature in existing facilities, and transportation barriers in existing vehicles used by an establishment for transporting individuals (not including barriers that can only be removed through the retrofitting of vehicles by the installation of a hydraulic or other lift), where such removal is readily achievable.

The Committee was faced with a choice in how to address the question of what actions, if any, a public accommodation should be required to take in order to remove structural barriers in existing facilities and vehicles. On the one hand, the Committee could have required retrofitting of all existing facilities and vehicles to make them fully accessible. On the other hand, the Committee could have required that no actions be taken to remove barriers in existing facilities and vehicles.

The Committee rejected both of these alternatives and instead decided to adopt a modest requirement that covered entities make structural changes or adopt alternative methods that are "readily achievable."

The phrase "readily achievable" is defined in section 301(5) to mean easily accomplishable and able to be carried out without much difficulty or expense. In determining whether an action is readily achievable, factors to be considered include:

(1) The overall size of the covered entity with respect to number of employees, number and type of facilities, and the size of the budget;

(2) The type of operation of the covered entity, including the composition and structure of the entity; and

(3) The nature and cost of the action needed.

It is important to note that readily achievable is a significantly lesser or lower standard than the "undue burden" standard used in this title and the "undue hardship" standard used in title I of this legislation. Any changes that are not easily accomplishable and are not able to be carried out without much difficulty or expense when the preceding factors are weighed are not required under the readily achievable standard, even if they do not impose an undue burden.

The concept of readily achievable should not be confused with the phraseology of "readily accessible" used in regard to accessibility requirements for alterations (section 302(b)(2)(A)(vi)) and new construction (section 303). While the word "readily" appears in both phrases and has roughly the same meaning in each context—easily, without much difficulty—the concepts of "readily achievable" and "readily accessible" are sharply distinguishable and represent almost polar opposites in focus.

The phrase "readily accessible to and usable by individuals with disabilities" focuses on the person with a disability and addresses the degree of ease with which an individual with a disability can enter and use a facility; it is access and usability which must be "ready."

"Readily achievable," on the other hand, focuses on the business operator and addresses the degree of ease or difficulty of the business operator in removing a barrier; if barrier removal cannot be accomplished readily, then it is not required.

What the "readily achievable" standard will mean in any particular public accommodation will depend on the circumstances, considering the factors listed previously, but the kind of barrier-removal which is envisioned includes the addition of grab bars, the simple ramping of a few steps, the lowering of telephones, the addition of raised letter and braille markings on elevator control buttons, the addition of flashing alarm lights, and similar modest adjustments.

This section may require the removal of physical barriers, including those created by the arrangement or location of such temporary or movable structures as furniture, equipment, and display racks. For example, a restaurant may need to rearrange tables and chairs, or a department store may need to adjust its layout of display racks and shelves, in order to permit access to individuals who use wheelchairs, where these actions can be carried out without much difficulty or expense.

A public accommodation would not be required to provide physical access if there is a flight of steps which would require extensive ramping or an elevator. The readily achievable standard only requires physical access that can be achieved without extensive restructuring or burdensome expense.

In small facilities like single-entrance stores or restaurants, "readily achievable" changes could involve small ramps, the installation of grab bars in restrooms in various sections and other such minor adjustments and additions.

The readily achievable standard allows for minimal investment with a potential return of profit from use by disabled patrons, often more than justifying the small expense.

Section 302(b)(2)(A)(v) of the legislation specifies that where an entity can demonstrate that removal of a barrier is not readily achievable, discrimination includes a failure to make such goods, services, facilities, privileges, advantages, and accommodations available through alternative methods if such methods are readily achievable.

With respect to the adoption of alternative methods, examples of "readily achievable" include: coming to the door to receive or return drycleaning; allowing a disabled patron to be served beverages at a table even though nondisabled persons having only drinks are required to drink at the inaccessible bar; providing assistance to retrieve items in an inaccessible location; and rotating movies between the first floor accessible theater and a comparable second floor inaccessible theater.

Section 302(b)(2)(A)(vi) of the legislation specifies that discrimination includes, with respect to a facility or part thereof that is altered by, on behalf of, or for the use of an establishment in a manner that affects or could affect the usability of the facility or part thereof, a failure to make the alterations in such a manner that, to the maximum extent feasible, the altered portion of the facility is readily accessible to and usable by individuals with disabilities.

Where the entity is undertaking major structural alterations that affect or could affect the usability of the existing facility, the entity must also make the alterations in such manner that, to the maximum extent feasible, the path of travel to the altered area, and the bathrooms, telephones, and drinking fountains serving the remodeled area, are readily accessible to and usable by individuals with disabilities.

The phrase "major structural alterations" will be defined by the Attorney General. The Committee intends that the term "structural" means elements that are a permanent or fixed part of the building, such as walls, suspended ceilings, floors, or doorways.

The term "major structural alterations" refers to structural alterations or additions that affect the primary functional areas of a building, e.g., the entrance, a passageway to an area in the building housing a primary function, or the areas of primary functions themselves. For example, structural alteration to a utility room in an office building would not be considered "major." On the other hand, structural alteration to the customer service lobby of a bank would be considered major because it houses a major or primary function of the bank building.

The legislation includes an exception regarding the installation of elevators, which specifies that the obligation to make a facility readily accessible to and usable by individuals with disabilities shall not be construed to require the installation of an elevator for facilities that are less than three stories or that have less than 3,000 square feet per story unless the building is a shopping center, a shopping mall, or the professional office of a health care provider or unless the Attorney General determines that a particular category of such facilities requires the installation of elevators based on the usage of such facilities.

The Committee wishes to make it clear that the exception regarding elevators does not obviate or limit in any way the obligation to comply with the other accessibility requirements established by this legislation, including requirements applicable to floors which, pursuant to the exception, are not served by an elevator. And, in the event a facility which meets the criteria for the exception nonetheless has an elevator installed, then such elevator shall be required to meet accessibility standards.

The Committee intends that the term "facility" means all or any portion of buildings, structures, sites, complexes, equipment, roads, walks, passageways, parking lots, or other real or personal property or interest in such property, including the site where the building, property, structure or equipment is located. This definition is consistent with the definitions used under current Federal regulations and standards and thus includes both indoor areas and outdoor areas where human-constructed improvements, structures, equipment, or property have been added to the natural environment.

The phrase "readily accessible to and usable by individuals with disabilities" is a term of art which is explained in the section of the report concerning new construction.

The phrase "to the maximum extent feasible" has been included to allow for the occasional case in which the nature of an existing facility is such as to make it virtually impossible to renovate the building in a manner that results in its being entirely accessible to and usable by individuals with disabilities. In all such cases, however, the alteration should provide the maximum amount of physical accessibility feasible.

Thus, for example the term "to the maximum extent feasible" should be construed as not requiring entities to make building alterations that have little likelihood of being accomplished without removing or altering a load-bearing structural member unless the load-bearing structural member is otherwise being removed or altered as part of the alteration.

Section 302(b)(2)(B) of the legislation includes policies applicable to fixed route vehicles used by entities that are not in the principal business of transporting people. First, it is considered discrimination for an entity to purchase or lease a bus or a vehicle that is capable of carrying in excess of 16 passengers, for which solicitations are made later than 30 days after the effective date of this Act that are not readily accessible to and usable by individuals with disabilities except that over-the-road buses shall be subject to section 304(b)(4) (which delays the effective date for 6 years for small operators and 5 years for other operators) and section 305 (which provides for a study of how to make the impact of making such buses accessible).

If an entity not in the principal business of transporting people purchases or leases a vehicle carrying 16 or fewer passengers after the effective date of title III that is not readily accessible to or usable by individuals with disabilities, it is discriminatory for such an entity to fail to operate a system that, when viewed in its entirety, ensures a level of service to individuals with disabilities equivalent to the level of service provided to the general public.

Section 302(b)(2)(C) includes provisions applicable to vehicles used in demand-responsive systems by entities that are not in the principal business of transporting people. The provisions applicable to such vehicles are the same as those applicable to fixed route vehicles except that the entity need not ensure that all new vehicles carrying more than 16 passengers are accessible if it can demonstrate that the system, when viewed in its entirety, already provides a level of service to individuals with disabilities equivalent to that provided to the general public.

For example, where a hotel at an airport provides free shuttle service, the hotel need not purchase new vehicles that are accessible so long as it makes alternative equivalent arrangements for transporting people with disabilities who cannot ride the inaccessible vehicles. This might be accomplished through the use of a portable lift or by making arrangements with another entity that has an accessible vehicle that can be made available to provide equivalent shuttle service.

New construction

Section 303 of the legislation sets forth obligations with respect to the construction of new facilities. This section is applicable to public accommodations and potential places of employment.

The term "potential places of employment" is defined in section 301(2) to mean facilities that are intended for nonresidential use and whose operations affect commerce. The Committee expects that implementing regulations concerning "potential places of employment" will cover the same areas in a facility as existing design standards. Thus, unusual spaces that are not duty stations, such as catwalks and fan rooms, would continue to lie outside the scope of design standards.

The term does not include facilities that are covered or expressly exempted from coverage under the Fair Housing Act of 1968.

Specifically, section 303(a) of the legislation specifies that it is unlawful discrimination for a public accommodation or potential place of employment to fail to design and construct facilities for first occupancy later than 30 months after the date of enactment of this Act that are readily accessible to and usable by individuals with disabilities, except where an entity can demonstrate that it is structurally impacticable to do so, in accordance with standards set forth or incorporated by reference in regulations issued under title III.

Section 303(b) of the legislation exempts entities from installing elevators under the same circumstances applicable to alterations (see section 302(b)(2)(A)(vi) and the accompanying clarifications in the report).

The phrase "readily accessible to or usable by" is a term of art which, in slightly varied formulations, has been applied in the Architectural Barriers Act of 1968 ("ready access to, and use of"), the Fair Housing Act of 1968, as amended ("readily accessible to and usable by"), and the regulations implementing section 504 of the Rehabilitation Act of 1973 ("readily accessible to and usable by") and is included in standards used by Federal agencies and private industry e.g., the Uniform Federal Accessibility Standards (UFAS) ("ready access to and use of") and the American National Standard for Buildings and Facilities—Providing Accessibility and Usability for Physically Handicapped People (ANSI A117.1) (readily accessible to, and usable by).

The term is intended to enable people with disabilities (including mobility, sensory, and cognitive impairments) to get to, enter, and use a facility. While the term does not necessarily require the accessibility of every part of every area of a facility, the term contemplates a high degree of convenient accessibility, entailing accessibility of parking areas, accessible routes to and from the facility, accessible entrances, usable bathrooms and water fountains, accessibility of public and common use areas, and access to the goods, services, programs, facilities, and accommodations offered at the facility.

The term is not intended to require that all parking spaces, bathrooms, stalls within bathrooms, etc. are accessible; only a reasonable number must be accessible, depending on such factors as their location and number.

Accessibility elements for each particular type of facility should assure both ready access to the facility and usability of its features and equipment and of the goods, services, and programs available therein.

For example, for a hotel "readily accessible to and usable by" includes, but is not limited to, providing full access to the public use and common use portions of the hotel; requiring all doors and doorways designed to allow passage into and within all hotel rooms and bathrooms to be sufficiently wide to allow passage by individuals who use wheelchairs; making a percentage of each class of hotel rooms fully accessible (e.g., including grab bars in bath and at the toilet, accessible counters in bathrooms); audio loops in meeting areas; signage, emergency flashing lights or alarms; braille or raised letter words and numbers on elevators; and handrails on stairs and ramps.

Of course, if a person with a disability needing a fully accessible room makes an advance registration without informing the hotel of the need for such a room arrives on the date of the reservation and no fully accessible room is available, the hote has not violated the Act. Moreover, a hotel is not required to forego renting fully accessible rooms to nondisabled persons if to do so would cause the hotel to lose a rental.

In a physician's office, "readily accessible to and usable by" would include ready access to the waiting areas, a bathroom, and a percentage of the examining rooms.

Historically, particularized guidance and specifications regarding the meaning of the phrase "readily accessible to and usable by" for various type of facilities have been provided by MGRAD, UFAS, and the ANSI standards. Under this legislation, such specificity will be provided by the expanded MGRAD standards to be issued by the Architectural and Transportation Barriers Compliance Board and by the regulations issued by the Attorney General, both of which are discussed subsequently in this report.

It is the expectation of the Committee that the regulations issued by the executive branch could utilize appropriate portions of MGRAD.

It is also the Committee's intent that the regulations will include language providing that departures from particular technical and scoping requirements, as revised, will be permitted so long as the alternative methods used will provide substantially equivalent or greater access to and utilization of the facility. Allowing these departures will provide covered entities with necessary flexibility to design for special circumstances and will facilitate the application of new technologies.

The phrase "structurally impracticable" is a narrow exception that will apply only in rare and unusual circumstances where unique characteristics of terrain make accessibility unusually difficult. Such limitations for topographical problems are analogous to an acknowledged limitation in the application of the accessibility requirements of the Fair Housing Amendments Act of 1988. In the House Committee Report accompanying the Act, the House Committee on the Judiciary noted:

> certain natural terrain may pose unique building problems. For example, in areas which flood frequently, such as waterfronts or marshlands, housing traditionally may be built on stilts. The Committee does not intend to require that the accessibility requirements of this Act over-

> ride the need to protect the physical integrity of multifamily housing that may be built on such sites.

By incorporating the phrase "structurally impracticable," the ADA explicitly recognizes an exception analogous to the "physical integrity" exception for peculiarities of terrain recognized implicitly in statutory language and expressly in the House Committee Report accompanying the Fair Housing Amendments Act. As under the Fair Housing Amendments Act, this is intended to be a narrow exception to the requirement of accessibility. It means that only where unique characteristics of terrain prevent the incorporation of accessibility features and would destroy the physical integrity of a facility is it acceptable to deviate from accessibility requirements. Buildings that must be built on stilts because of their location in marshlands or over water are one of the few situations in which the structurally impracticable exception would apply.

Neither under the ADA nor the Fair Housing Amendments Act should an exception to accessibility requirements be applied to situations in which a facility is located in "hilly" terrain or on a plot of land upon which there are steep grades; in such circumstances, accessibility can be achieved without destroying the physical integrity of a structure, and ought to be required in the construction of new facilities.

In those are circumstances in which it is structurally impracticable to achieve full compliance with accessibility requirements under the ADA, public accommodations should still be designed and constructed to incorporate accessibility features to the extent that they are structurally practicable. The accessibility requirements should not be viewed as an all-or-nothing proposition in such circumstances.

If it is structurally impracticable for a facility in its entirety to be readily accessible to and usable by people with disabilities, then those portions which can be made accessible should be. If a building cannot comply with the full range of accessibility requirements because of structural impracticability, then it should still be required to incorporate those features which are structurally practicable. And if it is structurally impracticable to make a particular facility accessible to persons who have particular types of disabilities, it is still appropriate to require it to be made accessible to persons with other types of disabilities.

If, for example, a facility which is of necessity built on stilts cannot be made accessible to persons who use wheelchairs because it is structurally impracticable to do so, this is no reason not to still require it to be accessible for individuals with vision or hearing impairments or other kinds of disabilities.

The new construction provision includes establishments that "are potential places of employment" as well as public accommodations. The Committee decided to include this provision to ensure that unnecessary barriers to employment are not built into facilities that are constructed in the future. Since it is easy and inexpensive to incorporate accessibility features in new construction, the Committee concluded that there is no rational justification for employers to continue to construct inaccessible facilities that will bar the entrance of and limit opportunities for people with disabilities for years to come.

In addition, this provision will ensure that all new facilities which potentially may be occupied by places of public accommodation but whose first occupant may not be such an entity are constructed in such a way that they are readily accessible to and usable by individuals with disabilities for the original use for which the building is intended.

The Committee decided not to limit this provision to potential places of employment of 15 or more employees because of the desire to establish a uniform requirement of accessibility in new construction, because of the ease with which such a requirement can be accomplished in the design and construction stages, and because future expansion of a business or sale or lease of the property to a larger employer or to a business that is open to the public is always a possibility.

The phrase "are potential places of employment" is not intended to make an establishment that is not a public accommodation subject to the other provisions of this title e.g., the obligation to provide auxiliary aids or services.

Prohibition of discrimination in public transportation services provided by private entities

Section 304(a) of the legislation specifies that no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of public transportation services provided by a privately operated entity that is primarily engaged in the business of transporting people, but is not in the principal business of providing air transportation, and whose operations affect commerce.

The term "public transportation" is defined in section 301(4) of the legislation to mean transportation by bus or rail, or by any other conveyance (other than by air travel) that provides the general public with general or special service (including charter service) on a regular and continuing basis.

The Committee wishes to make it clear that the provisions of title III do not apply to public entities such as public transit authorities and school districts. Public entities providing transportation services are generally subject to the provisions of title II of this legislation and school bus operations are generally covered by regulations implementing section 504 of the Rehabilitation Act of 1973 issued by agencies providing Federal financial assistance to school districts.

The Committee also wishes to make it clear that title III does not apply to volunteer-driven commuter ridership arrangements.

The Committee excluded transportation by air because the Congress recently passed the Air Carriers Access Act, which was designed to address the problem of discrimination by air carriers and it is the Committee's expectation that regulations will be issued that reflect congressional intent.

Section 304(b) of the legislation includes specific applications of the general prohibition set out in section 303(a). As used in subsection (a), the term "discrimination against" includes:

(1) The imposition or application by an entity of eligibility criteria that screen out or tend to screen out an individual

with a disability or any class of individuals with disabilities from fully enjoying the public transportation services provided by the entity;

(2) The failure of an entity to—

(A) make reasonable modifications consistent with those required under section 302(b)(2)(A)(ii);

(B) provide auxiliary aids and services consistent with the requirements of section 302(b)(2)(A)(iii); and

(C) remove barriers consistent with the requirements of section 302(b)(2)(A) (iv), (v), and (vi); and

(3) The purchase or lease of a new vehicle (other than an automobile or over-the-road bus) that is to be used to provide public transportation services, and for which a solicitation is made later than 30 days after the effective date of this Act, that is not readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

The bill includes a special exception for vehicles used in a demand-responsive system. In the case of a vehicle used in a demand-response system, the new vehicle need not be readily accessible to and usable by individuals with disabilities if the entity can demonstrate that such system, when viewed in its entirety, provides a level of service to individuals with disabilities equivalent to the level of service provided to the general public.

With respect to the purchase of new over-the-road buses, it is considered discrimination to purchase or lease a new over-the-road bus that is used to provide public transportation services and for which a solicitation is made later than 6 years after the date of enactment of this Act for small providers (as defined by the Secretary of Transportation) and 5 years for other providers, that is not readily accessible to and usable by individuals with disabilities.

The term "readily accessible to and usable by" means, with respect to vehicles used for public transportation, able to be entered into and exited from and safely and effectively used by individuals with disabilities, including individuals who use wheelchairs.

Currently, technology may not exist that will enable an individual who uses a wheelchair to access restrooms in over-the-road buses without resulting in the significant loss of current seating capacity. Since this legislation is future driven, the Committee intends that the Department of Transportation develop regulations which require that accessible restrooms be installed on intercity coaches when technologically feasible.

Lifts or ramps, and fold-up seats or other wheelchair spaces with appropriate securement devices are among the current features necessary to make transit vehicles readily accessible to and usable by individuals with disabilities. The requirement that a vehicle is to be readily accessible obviously entails that each vehicle is to have some spaces for individuals who use wheelchairs or three-wheeled mobility aids; how many spaces per vehicle are to be made available for wheelchairs is, however, a determination that depends on various factors, including the number of vehicles in the fleet, seat vacancy rates, and usage by people with disabilities.

The Committee intends that, consistent with these general factors, the determination of how many spaces must be available should be flexible and generally left up to the provider; provided that at least some spaces on each vehicle are accessible. Technical specifications and guidance regarding lifts and ramps, wheelchair spaces, and securement devices are to be provided in the minimum guidelines and regulations to be issued under this legislation.

The Committee intends that during the interim periods prior to the date when over-the-road buses must be readily accessible to and usable by individuals with disabilities that regulations specify that providers modify their policies so that individuals who use wheelchairs may get on and off such buses without having to bring their own attendant to help them get on and off the bus. Further, policies should be modified to require the on-board storage of batteries for battery operated wheelchairs.

Section 305 of the legislation directs the Architectural and Transportation Barriers Compliance Board to undertake a study to determine the access needs of individuals with disabilities to over-the-road buses and the most cost effective methods for making over-the-road buses readily accessible to and usable by individuals with disabilities.

In determining the most cost-effective methods for making over-the-road buses readily accessible to and usable by persons with disabilities, particularly individuals who use wheelchairs, the legislation specifies that the study should analyze the cost of providing accessibility, recent technological and cost saving developments in equipment and devices, and possible design changes.

Thus, the Committee is interested in having the study include a review of current technology such as lifts that enable persons with mobility impairments, particularly those individuals who use wheelchairs, to get on and off buses without being carried; alternative designs to the current lifts; as well as alternative technologies and modifications to the design of buses that may be developed that will also enable such individuals to get on and off over-the-road buses without being carried.

It is also expected that the study will review alternative design modifications that will enable an individual using the over-the-road bus to have access to the restroom and at the same time permitting the provider to retain approximately the same seating capacity.

The study must also assess the impact of accessibility requirements on the continuation of inter-city bus service by over-the-road buses, with particular consideration of impact on rural service in light of the economic pressures on the bus industry that have lead to a reduction of service, particularly in rural America. According to an analysis by the Interstate Commerce Commission staff, 3,400 communities lost all intercity bus service between 1982 and 1986. Of these nine-tenths were areas with populations of under 10,000.

Thus, this study should analyze how the private bus operators can comply with the requirement in section 304 of the legislation that over-the-road buses be made readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, without contributing to the deterioration of rural bus service.

It is the Committee expectation that the study will also review current policies that impede the shared use by private companies providing tours and charter services of public buses that are currently accessible. Another component of the study may be to seek ways to link local providers of accessible transportation services with intercity bus service in hub areas. This may necessitate expansion of service by local providers to match intercity and intermodal schedules in order to help ensure effective development of such a feeder service relationship.

The Committee recognizes that after deregulation of the airline and rail industries, safety net programs were implemented to assist States in preserving efficient air and rail transportation, primarily between smaller cities and communities threatened by the loss of service. No similar Federal program was established to assist the private bus industry. The Committee expects that the study will consider whether and, if deemed appropriate, identify policy alternatives that might assist private bus companies meet the mandates in this legislation.

The legislation also calls for the establishment of an advisory board of which 50 percent of the members must be selected from among private operators using over-the-road buses, bus manufacturers, and lift manufacturers; and 50 percent of the members must be individuals with disabilities, particularly individuals who use wheelchairs, who are potential riders of such buses.

Anyone in the business of providing taxi service shall not discriminate on the basis of disability in the delivery of that service. For example, it would be illegal under the Act to refuse to pick up a person on the basis of that person's disability. A taxi cab driver could not refuse to pick up someone in a wheelchair because he or she believes that the person could not get out of their chair or because he or she did not want to lift the wheelchair into the trunk of the taxi or put it in the back seat.

Regulations

Section 306(a) of the legislation specifies that not later than one year after the date of enactment of this Act, the Secretary of Transportation shall issue regulations in an accessible format that shall include standards applicable to facilities and vehicles covered under section 302(b)(2) (B) and (C) and section 304.

With respect to section 304(b)(4) of the legislation, the Committee recognizes the apparent anomaly in requiring the promulgation of regulations while a needs and impact assessment is in progress and two years prior to the submission of the study and its recommendations to the President and the Congress. This timing, however, should not be construed as calling into question the importance or necessity of empirical data and technolgical information to this rulemaking process. Rather, the Committee believed it wise that, with respect to over-the-road buses, regulations be in place well in advance of the compliance dates of the Act.

The Committee fully expects that, following submission, the study and its recommendations will be expeditiously and carefully reviewed to determine if, or to what extent, the regulations promulgated pursuant to this section of the legislation need to be revised or amended.

Section 306(b) of the legislation, specifies that not later than one year after the date of enactment of this Act, the Attorney General shall issue regulations in an acccessible format to carry out the remaining provisions of this title not referred to in subsection (a) that include standards applicable to facilities and vehicles covered under section 302.

Standards included in regulations issued under subsections (a) and (b) shall be consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board in accordance with section 504.

Exemptions for private clubs and religious organizations

Section 307 of the legislation specifies that the provisions of title III do not apply to private clubs or establishments exempted from coverage under title II of the Civil Rights Act of 1964 or to religious organizations or to entities controlled by religious organizations. Places of worship and schools controlled by religious organizations are among those organizations and entities which fall within this exemption.

The reference to "entities controlled by a religious organization" is modeled after the provisions in title IX of the Education Amendments of 1972. Thus, it is the Committee's intent that the term "controlled by a religious organization" be interpreted consistently with the Attachment which accompanied the Assurance of Compliance with title IX required by the U.S. Department of Education. Of course, the Committee recognizes that unlike the title IX exemption, this provision applies to entities that are not educational institutions. The term "religious organization" has the same meaning as the term "religious organization" in the phrase "entitles controlled by a religious organization."

Activities conducted by a religious organization or an entity controlled by a religious organization on its own property which are open to nonmembers of that organization or entity are included in this exemption.

Enforcement

Section 308 of the legislation sets forth the scheme for enforcing the rights provided for in title III. Section 308(a)(1) provides a private right of action for any individual who is being or is about to be subjected to discrimination on the basis of disability in violation of title III. This subsection makes available to such an individual the remedies and procedures set forth in section 204a–3(a) of the Civil Rights Act of 1964 (preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order).

Section 308(a)(2) of the legislation makes it clear that in the case of violations of section 302(b)(2)(A)(iv) pertaining to removing barriers in existing facilities, section 302(b)(2)(A)(vi) pertaining to alterations of existing facilities, and section 303(a) pertaining to new construction, injunctive relief shall include an order to alter facilities to make such facilities readily accessible to and usable by individuals with disabilities as required by title III.

Where appropriate, injunctive relief shall also include requiring the provision of an auxiliary aid or service, modification of a policy, or provision of alternative methods, to the extent required by this title.

Section 308(b) of the legislation specifies the enforcement scheme for the Attorney General. First, the Attorney General shall investigate alleged violations of title III, which shall include undertaking periodic reviews of compliance of covered entities.

If the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by title III or that any person or group of persons has been denied any of the rights granted by title III and such denial raises an issue of general public importance, the Attorney General may commence a civil action in any appropriate United States District Court.

In a civil action brought by the Attorney General, the court may grant any equitable relief it considers to be appropriate, including granting temporary, preliminary, or permanent relief, providing an auxiliary aid or service, modification of policy or alternative method, or making facilities readily accessible to and usable by individuals with disabilities, to the extent required by title III.

In addition, a court may award such other relief as the court considers to be appropriate, including monetary damages to persons aggrieved, when requested by the Attorney General. Thus, it is the Committee's intent that the Attorney General shall have discretion regarding the damages he or she seeks on behalf of persons aggrieved. It is not the Committee's intent that this authority include the authority to award punitive damages.

Furthermore, the court may vindicate the public interest by assessing a civil penalty against the covered entity in an amount not exceeding $50,000 for a first violation and not exceeding $100,000 for any subsequent violation.

Effective date

In accordance with section 309 of the legislation, title III of the legislation shall become effective 18 months after the date of enactment of this legislation.

TITLE IV—TELECOMMUNICATIONS RELAY SERVICES

Title IV of the legislation, as reported, will help to further the statutory goals of universal service as mandated in the Communications Act of 1934. It will provide to hearing- and speech-impaired individuals telephone services that are functionally equivalent to those provided to hearing individuals.

Background

There are over 24 million hearing-impaired and 2.8 million speech-impaired individuals in the United States, yet inadequate attention has been paid to their special needs with respect to accessing the Nation's telephone system. Given the pervasiveness of the telephone for both commercial and personal matters, the inability to utilize the telephone system fully has enormous impact on an individual's ability to integrate effectively in today's society.

The Communications Act of 1934 mandates that communications services be "[made] available, so far as possbile, to *all* the people of the United States. * * *". (Section 1, emphasis added). This goal of universal service has governed the development of the Nation's telephone system for over fifty years. The inability of over 26 million Americans to access fully the Nation's telephone system poses a serious threat to the full attainment of the goal of universal service.

In order to realize this goal more fully, Title IV of this legislation amends Title II of the Communications Act of 1934, as amended, by adding a new section 225. This new section imposes on all common carriers providing interstate or intrastate telephone service, an obligation to provide to hearing and speech impaired individuals telecommunications services that enable them to communicate with hearing individuals. These services must be functionally equivalent to telephone service provided to hearing individuals. Carriers are granted the flexibility to determine whether such services are provided by the carrier alone, in concert with other carriers, or through a designee. Hereinafter, this part of the Report will be referring to this new section 225 and not to sections in S. 933, The Americans with Disabilities Act.

Currently, individuals with hearing and speech impairments can communicate with each other over the telephone network with the aid of Telecommunications Devices for the Deaf (TDDs). TDDs use a typewriter-style device equipped with a message display (screen and/or printer) to send a coded signal through the telephone network. However, users of TDDs can communicate only with other users of TDDs. This creates serious hardships for Americans with hearing and/or speech impairments, since access to the community at large is significantly limited.

The Committee intends that section 225 better serve to incorporate the hearing- and speech-impaired communities into the telecommunications mainstream by requiring that telephone services be provided to hearing and/or speech impaired individuals in a manner that is functionally equivalent to telephone services offered to those who do not have these impairments. This requirement will service to bridge the gap between the communications impaired telephone and the community at large. To participate actively in society, one must have the ability to call firends, family, businesses, and employers.

Current technology allows for communications between a TDD user and a voice telephone user by employing a type of relay system. Such systems include a third party operator who completes the connection between the two parties and who transmits messages back and forth in real time between the TDD user and the hearing individual. The originator of the call communicates to the operator either by voice or TDD. The operator then uses a video display system to translate the typed or voice message simultaneously from one medium to the other.

Although the Committee notes that relay systems represent the current state-of-the-art, this legislation is not intended to discourage innovation regarding telecommunications services to individuals with hearing and speech impairments. The hearing- and speech-impaired communities should be allowed to benefit from advancing technology. As such, the provisions of this section do not seek to entrench current technology but rather to allow for new, more advanced, and more efficient technology.

The Committee intends that the FCC have sufficient enforcement authority to ensure that telecommunications relay services are provided nationwide and that certain minimum federal standards are met by all providers of such services. The FCC's authority over the provision of intrastate telecommunications relay services, however, is expressly limited by certification procedures required to be established under this section whereby a state retains jurisdiction over the intrastate provision of telecommunications relay services.

The Committee finds it necessary to grant the FCC such residual authority in this instance to ensure universal service to the hearing- and speech-impaired community. Although a number of states have mandated statewide relay systems, the majority of states have not done so. Moreover, the systems that do exist vary greatly in quality and accessibility. The Committee finds that to ensure universal service to this population of users, service must be made uniformly available on a local, intrastate, and interstate basis. It is the Committee's hope and expectation, however, that all states will seek certification in a timely manner and that the FCC will not find it necessary to exercise its enforcement authority. It is essential to this population's well-being, self-sufficiency and full integration into society to be able to access the telecommunications network and place calls nationwide without regard to geographic location.

Attaining meaningful universal service for this population also requires that some level of minimum federal standards for service, service quality, and functional equivalency to voice telephone services be established and maintained. The FCC is therefore required to establish certain minimum federal standards that all telecommunications relay service providers must meet.

By requiring telecommunications relay services to be provided throughout the United States, this section takes a major step towards enabling individuals with hearing and speech impairments to achieve the level of independence in employment, public accommodations and public services sought by other sections of the Americans with Disabilities Act. The Committee concludes that expanding the FCC's authority in this instance will both promote interstate commerce and be of benefit to all Americans.

The grant of jurisdiction to the FCC is limited, however, by the state certification procedures required to be established under this section. It is the Committee's intention that these procedures operate to preserve initiatives by a state or group of states to implement a telecommunications relay services program within that state or within a region either through the state itself, through designees, or through regulation of intrastate common carriers. As such, the section provides that any state may regulate intrastate telecommunications relay services provided by intrastate carriers once the state is granted certification by the FCC. The FCC is to establish clearly defined procedures for requesting certification and a review process to ensure that a state program, however it is provided, satisfies the minimum standards promulgated under this section. The certification procedures and review process should afford the least possible intrusion into state jurisdiction consistent with the goals of this section to have nationwide universal service for hearing- and speech-impaired individuals.

The Committee intends that telecommunications relay services be governed by minimum federal standards that will ensure that telephone service for hearing and speech impaired individuals is functionally equivalent to telephone services offered to hearing individuals. Such standards, however, should not have the effect of freezing technology or thwarting the introduction of a superior or more efficient technology.

Cost recovery for telecommunications relay services will be determined by the FCC in the case of interstate telecommunications relay services and by certified states in the case of intrastate telecommunications relay services. While states are granted the maximum latitude to determine the method of cost recovery for intrastate relay services provided under their jurisdiction, the FCC is specifically prohibited from allowing the imposition of a flat monthly charge on residential end users to recover the costs of providing interstate telecommunications relay service. It is the Committee's expectation that the costs of providing telecommunications relay services will be considered a legitimate cost of doing business and therefore a recoverable expense through the regulatory ratemaking process.

Definitions

Section 225(a) defines: (1) "Common Carrier or Carrier" to include interstate carriers and intrastate carriers for purposes of this section only; (2) "TDD" to mean a machine that may be used by a variety of disabled individuals such as deaf, hard of hearing, deaf-blind, or speech impaired individuals and that employs graphic communications through the transmission of coded signals over telephone wires; and (3) "Telecommunications relay services" to mean telephone transmission services that allow a hearing- and/or speech-impaired individual to communicate in a manner that is functionally equivalent to voice communications services offered to hearing individuals. The term includes, but is not limited to, TDD relay services.

Availability of telecommunications relay services

Section 225(b)(1) states that in furtherance of the goals of universal service, the FCC must ensure that interstate and intrastate telecommunications relay services are provided to the greatest extent possible and in the most efficient manner.

Section 225(b)(2) extends the remedies, procedures, rights and obligations applicable to interstate carriers under the Communications Act of 1934, as amended, to intrastate carriers for the limited purpose of implementing and enforcing the requirements of this section.

Provision of services

Section (c) requires that carriers providing telephone voice transmission services provide telecommunications relay services within two years after the date of enactment of this section. Carriers are to offer to hearing- and speech-impaired individuals services which are functionally equivalent to telephone services provided to hearing individuals including providing services with the same geographic radius that they offer to hearing individuals. Carriers are granted the flexibility to provide such services either individually, in concert with other carriers, or through designees. In exercising this flexibility to appoint designees, however, carriers must ensure that all requirements of this section are complied with.

Regulations

Section (d) requires the FCC to prescribe the necessary rules and regulations to carry out the requirements of this section within one year of its enactment.

Also, given the unique and specialized needs of the population that will be utilizing telecommunications relay services, the FCC should pay particular attention to input from representatives of the hearing and speech impaired community. It is recommended that this input be obtained in a formal manner such as through an advisory committee that would represent not only telecommunications relay service consumers but also carriers and other interested parties. The Committee notes that the FCC has already issued several notices on the creation of an interstate relay system and the most efficient way such a system could be provided. While the FCC is afforded a significant amount of flexibility in implementing the goals of this section, subsection (d) requires that the FCC establish certain minimum standards, practices and criteria applicable to all telecommunications relay services and service providers as follows:

Section (d)(1)(A) requires the FCC to establish functional requirements, guidelines, and operational procedures for the provision of telecommunications relay services. One of these requirements shall be that all carriers subject to this section shall provide telecommunications relay services on a non-discriminatory basis to all users within their serving area. The FCC should pursue means in which the goals of this section may be met in the most efficient manner. In addition, the Commission should include specific language requiring that operators be sufficiently trained so as to effectively meet the specialized communications needs of individuals with hearing and speech impairments, including sufficient skills in typing, grammar and spelling.

Section (d)(1)(B) requires the FCC to establish minimum federal standards to be met by all providers of intrastate and interstate telecommunications relay services including technical standards, quality of service standards, and the standards that will define functional equivalence between telecommunications relay services and voice telephone transmission services. Telecommunications relay services are to be governed by standards that ensure that telephone service for hearing- and speech-impaired individuals is functionally equivalent to voice services offered to hearing individuals. In determining factors necessary to establish functional equivalency, the FCC should include, for example, the requirement that telecommunications relay services transmit messages between the TDD and voice caller in real time, as well as the requirement that blockage rates for telecommunications relay services be no greater than standard industry blockage rates for voice telephone services. Other factors that should be included are the opportunity for telecommunications relay service users to choose an interstate carrier whenever possible. The FCC should enumerate other such measurable standards to ensure that hearing and non-hearing individuals have equivalent access to the Nation's telephone networks.

Section (d)(1)(C) requires that such telecommunications relay services operate 24 hours a day, seven days a week.

Section (d)(1)(D) requires that users of telecommunications relay services pay rates no greater than the rates paid for functionally equivalent voice communication with respect to such factors as the duration of the call, the time of day, and the distance from point of origination to point of termination. Although the Committee commends states that have chosen to implement a discount, this section is not intended to mandate a rate discount with respect to call duration.

Section (d)(1)(E) prohibits relay operators from refusing calls or limiting the length of calls that use such relay services.

Section (d)(1)(F) prohibits relay operators from disclosing the content of any relayed conversation and from keeping records of the content of any such conversation beyond the duration of that call. The Committee recognizes that printed records of such calls may be necessary to complete the call; however, this requirement is to ensure that records are not kept after termination of the conversation. In addition, the Committee recognizes that it may be technically impossible today to relay recorded messages in their entirety because TDDs can only transmit messages at a given speed. In these situations, a hearing or speech impaired individual should be given the option to have the message summarized.

Section (d)(1)(G) prohibits relay operators from intentionally altering any relayed conversation.

Section (d)(2) requires that the FCC ensure that regulations prescribed to implement this section encourage the use of state-of-the-art technology. Such regulations should not have the effect of freezing technology or thwarting the introduction of a superior or more efficient technology.

Section (d)(3) states that the Commission should issue regulations to govern the separation of costs for the services provided pursuant to this section. No change to the procedures for allocating joint costs between the interstate and intrastate jurisdictions as set forth elsewhere in the Communications Act of 1934 is intended.

Section (d)(4) prohibits the Commission from allowing the imposition of a fixed monthly charge on residential customers to recover the costs of providing interstate telecommunications relay services. However, the manner in which the costs of providing intrastate telecommunications relay services are recovered is left to the discretion of certified states. It is the Committee's expectation that the costs of providing such services will be considered a legitimate cost of doing business and therefore a recoverable expense through the regulatory ratemaking process.

Section (d)(5) grants the FCC flexibility to extend the date of full compliance with the requirements of this Section by one year for any carrier or group of carriers that it finds will be unduly burdened. Interested parties should be given an opportunity to comment on any such request for an extension and such requests should not be granted without compelling justification.

Enforcement

Section (e)(1) requires that the Commission enforce the requirements of this section subject to subsections (f) and (g). The Committee intends that the FCC have sufficient enforcement authority to ensure that telecommunications relay services are provided nationwide and that certain minimum federal standards are met by all providers of the service. The FCC's authority over the provision of intrastate telecommunications relay services, however, is expressly limited by certification procedures required to be established under subsection (f) whereby a state retains jurisdiction over the intrastate provision of telecommunications relay services.

Section (e)(2) requires that the Commission resolve any complaint by final order within 180 days after that complaint has been filed.

Certification

Sections (f) (1) and (2) describe the state certification procedure whereby states may apply to reassert jurisdiction over the provision of intrastate telecommunications relay services. The FCC may grant certification upon a showing that such services are being made available in the state and that they comply with the federal guidelines and standards promulgated pursuant to section (d). A state plan may make service available through the state itself, through designees or through regulation of intrastate carriers.

Section (f)(3) states that, except for reasons affecting rules promulgated pursuant to section (d), the FCC may not deny certification to a state based solely on its chosen method of funding the provision of intrastate telecommunications relay services. Section (d), however, would require that a state program not include cost recovery mechanisms that would have the effect of requiring users of telecommunications relay services to pay effectively higher rates than those paid for functionally equivalent voice communications services. Additionally, the Committee urges that because this service is of benefit to all society that any funding mechanism not be labeled so as to unduly prejudice the hearing- and speech-impaired community.

Section (f)(4) allows for the Commission to revoke such certification, if after notice and opportunity for hearing, the Commission determines that certification is no longer warranted.

Complaint

Section (g)(1) states that when a complaint is filed with the Commission that alleges a violation of this section with respect to the provision of intrastate telecommunication relay services, the Commission shall refer such complaint to the appropriate State commission if that State has been duly certified by the FCC pursuant to section (f). If the appropriate State has not been duly certified, then the Commission will handle the complaint pursuant to sections (e) (1) and (2).

Once a complaint has been properly referred to a State Commission, subsection (g)(2) permits the FCC to exercise its jurisdiction over such a complaint only if final action has not been taken within 180 days after the complaint is filed with the State, or within a shorter period as prescribed by the regulations of such State, or if the Commission determines that a State program no longer qualifies for certification under section (f).

TITLE V—MISCELLANEOUS PROVISIONS

Construction

Section 501 of the legislation specifies the relationship between this legislation and the Rehabilitation Act of 1973 and other Federal, State or local laws. Section 501 also specifies the relationship between this legislation and the regulation of insurance.

With respect to the Rehabilitation Act of 1973, section 501(a) of the legislation specifies that nothing in this legislation should be construed to reduce the scope of coverage or apply a lesser standard than the coverage required or the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. 790 et seq.) or the regulations issued by the Federal agencies pursuant to such title.

With respect to other laws, section 501(b) of the legislation specifies that nothing in this legislation should be construed to invalidate or limit any other Federal law or law of any State or political subdivision of any State or jurisdiction that provides greater protection for the rights of individuals with disabilities that are afforded by this legislation. This legislation could be construed to be in conflict with other laws governing spaces or worksites, for example OSHA requirements. The Committee expects the Attorney General to exercise coordinating authority to avoid and eliminate conflicts.

With respect to insurance, section 501(c) of the legislation specifies that titles I, II, and III of this legislation shall not be construed to prohibit or restrict—

> (1) An insurer, hospital or medical service company, health maintenance organization, or any agent, or entity that administers benefit plans, or similar organizations from underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or
>
> (2) Any person or organization covered by this Act from establishing, sponsoring or observing the terms of a bona fide benefit plan which terms are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law;

provided that points (1) and (2) are not used as a subterfuge to evade the purposes of titles I, II and III of this legislation.

As indicated earlier in this report, the main purposes of this legislation include prohibiting discrimination in employment, public services, and places of public accommodation. The Committee does not intend that any provisions of this legislation should affect the way the insurance industry does business in accordance with the State laws and regulations under which it is regulated.

Virtually all States prohibit unfair discrimination among persons of the same class and equal expectation of life. The ADA adopts this prohibition of discrimination. Under the ADA, a person with a disability cannot be denied insurance or be subject to different terms or conditions of insurance based on disability alone, if the disability does not pose increased risks.

Since there is some uncertainty over the possible interpretations of the language contained in titles I, II and III as it applies to insurance, the Committee added section 501(c) to make it clear that this legislation will not disrupt the current nature of insurance underwriting or the current regulatory structure for self-insured employers or of the insurance industry in sales, underwriting, pricing, administrative and other services, claims, and similar insurance related activities based on classification of risks as regulated by the States.

However, the decision to include this section may not be used to evade the protections of title I pertaining to employment, title II pertaining to public services, and title III pertaining to public accommodations beyond the terms of points (1) and (2), regardless of the date an insurance plan or employer benefit plan was adopted.

For example, an employer could not deny a qualified applicant a job because the employer's current insurance plan does not cover the person's disability or because of the increased costs of the insurance.

Moreover, while a plan which limits certain kinds of coverage based on classification of risk would be allowed under this section, the plan may not refuse to insure, or refuse to continue to insure, or limit the amount, extent, or kind of coverage available to an individual, or charge a different rate for the same coverage solely because of a physical or mental impairment, except where the refusal, limitation, or rate differential is based on sound actuarial principles or is related to actual or reasonably anticipated experience.

For example, a blind person may not be denied coverage based on blindness independent of actuarial risk classification. Likewise, with respect to group health insurance coverage, an individual with a pre-existing condition may be denied coverage for that condition for the period specified in the policy but cannot be denied coverage for illnesses or injuries unrelated to the pre-existing condition.

Specifically, point (1) makes it clear that insurers may continue to sell to and underwrite individuals applying for life, health, or other insurance on an individually underwritten basis, or to service such insurance products.

Point (2) recognizes the need for employers, and/or agents thereof, to establish and observe the terms of employee benefit plans, so long as these plans are based on underwriting or classification of risks.

In both cases, points (1) and (2) shall not be used as a subterfuge to evade the purposes of titles I, II and III of the legislation, regardless of the date the insurance plan or employer benefit plan was adopted.

As explained previously in this report, the Committee also wishes to clarify that in its view, as is stated by the U.S. Supreme Court in *Alexander* v. *Choate,* 469 U.S. 287 (1985), employee benefit plans should not be found to be in violation of this legislation under impact analysis simply because they do not address the special needs of every person with a disability, e.g., additional sick leave or medical coverage.

Moreover, this subsection must be read to be consistent with subsection (b) of section 501 pertaining to other Federal and State laws.

In sum, section 501(c) is intended to afford to insurers and employers the same opportunities they would enjoy in the absence of this legislation to design and administer insurance products and benefit plans in a manner that is consistent with basic principles of insurance risk classification. Without such a clarification, this legislation could arguably find violative of its provisions any action taken by an insurer or employer which treats disabled persons differently under an insurance or benefit plan because they represent an increased hazard of death or illness.

The provisions recognize that benefit plans (whether insured or not) need to be able to continue present business practices in the way they underwrite, classify, and administer risks, so long as they carry out those functions in accordance with accepted principles of insurance risk classification.

While the bill is intended to apply nondiscrimination standards equally to self-insured plans as well as to third-party payer and third-party administered plans with respect to persons with disabilities, section 501(c) of this legislation should not be interpreted as subjecting self-insured plans to any State insurance laws of general application regarding underwriting risks, classifying risks, or administering such risks that are otherwise preempted by the Employee Retirement Income Security Act of 1974 (ERISA).

Prohibition against retaliation and coercion

Section 502(a) of the legislation specifies that no individual shall discriminate against any other individual because such other individual has opposed any act or practice made unlawful by this Act or because such other individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this Act.

Section 502(b) of the legislation specifies that it shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her have aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by this legislation.

Section 502(c) of the legislation specifies that the remedies and procedures available under sections 106, 205, and 308 shall be available to aggrieved persons for violations of subsections (a) and (b).

State immunity

Section 503 of the legislation specifies that a State shall not be immune under the Eleventh Amendment to the Constitution of the United States from an action in Federal court for a violation of this Act. In any action against a State for a violation of the requirements of this Act, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.

This provision is included in order to comply with the standards for covering states set forth in the *Atascadero State Hospital* v. *Scanlon*, 105 S. Ct. 3142 (1985).

Regulations by the Architectural and Transportation Barriers Compliance Board

Section 504 specifies that not later than 6 months after the date of enactment of this Act, the Architectural and Transportation Barriers Compliance Board shall issue minimum guidelines that shall supplement the existing Minimum Guidelines and Requirements for Accessible Design for purposes of titles II and III.

These guidelines shall establish additional requirements, consistent with this Act, to ensure that buildings, facilities, and vehicles are accessible, in terms of architecture and design, transportation, and communication, to individuals with disabilities.

The "Minimum Guidelines and Requirements for Accessible Design" (MGRAD), as issued and revised by the Board have provided guidance to four Federal standard-setting agencies (the General Services Administration, the Department of Defense, the Department of Housing and Urban Development, and the U.S. Postal Service) in their regulations establishing the Uniform Federal Accessibility Standards (UFAS).

The ADA directs the Board to issue supplemental guidelines and requirements to guide two additional Federal standard-setting agencies—the Department of Transportation and the Department of Justice—in their development of regulations under this legislation.

The development of supplemental MGRAD will require the Board to complete and expand its previous guidelines and requirements. There are some areas within the Board's MGRAD authority in which it has not yet issued minimum guidelines. One such example is the area of recreation. In 1985, the Federal Government Working Group on Access to Recreation Developed for the Board a technical paper titled, "Access to Outdoor Recreation Planning and Design," including technical requirements and specific guidelines, but the Board has not officially issued minimum guidelines and requirements in this area. The Committee expects the Board to take prompt action to complete the filling of such gaps in the existing MGRAD.

In issuing the supplemental minimum guidelines and requirements called for under this legislation, the Board should consider whether other revisions or improvements of the existing MGRAD (including scoping provisions) are called for to achieve consistency with the intent and the requirements of this legislation. Particular attention should be paid to providing greater guidance regarding communication accessbility.

In no event shall the minimum guidelines issued under this legislation reduce, weaken, narrow, or set less accessibility standards than those included in existing MGRAD.

This legislation also explicitly provides that the Board is to develop minimum guidelines for vehicles. The Committee intends that the Board shall issue minimum guidelines regarding various types of conveyances and means of transport that come within the ambit of titles II and III of the legislation. Such guidelines should include specifications regarding wheelchair lifts and ramps on vehicles where necessary for boarding and getting off. The Board should also review its minimum guidelines regarding stations and other places of boarding or departure from vehicles to make sure that they are coordinated with and complementary to the minimum guidelines regarding vehicles.

Attorneys fees

Section 505 specifies that in any action or administrative proceeding commenced pursuant to this Act, the court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs, and the United States shall be liable for the foregoing the same as a private individual.

Technical assistance

Section 506 specifies that the Attorney General, in consultation with the Secretary of Transportation, the Chairman of the Federal Communications Commission, and the Secretary of Commerce, shall, within 180 days after the enactment of this legislation, develop and implement a plan to assist entities covered under this legislation.

The Attorney General is authorized to obtain the assistance of other Federal agencies in carrying out his or her responsibilities.

VII. REGULATORY IMPACT

In accordance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the following statement of the regulatory impact of S. 933 is made:

A. ESTIMATED NUMBER OF INDIVIDUALS AND BUSINESSES REGULATED AND THEIR GROUPS OR CLASSIFICATIONS

S. 933 would regulate all private sector employers with 15 or more employees. Data from the Equal Employment Opportunity Commission for 1989 put the number of employers with 15 or more employees at 666,000. The bill would regulate all units of State and local government, which do not receive Federal aid. The total number of units of State and local government in the United States is 83,250. Many of these units of government already are subject to section 504 of the Rehabilitation Act of 1973, as amended, which contains similar requirements to this bill.

S. 933 would also regulate private businesses engaged in commerce and open to the general public, of which Census Bureau figures indicate there are approximately 3.9 million. For new construction, the ADA will add accessibility requirements not already contained in existing State laws to 44 percent of new commercial construction.

There are over 1500 telephone common carriers in the United States that will be subject to the provisions of this law. The law permits these companies to act in concert or to contract out to third parties to provide this service over their networks, much as they do today in providing various forms of operator services. The legislation deliberately leaves these options to the carriers in order to encourage them to find the most economically efficient means of providing the service.

Approximately forty-three million persons with disabilities will be entitled to the protections of this legislation as employees, job applicants, clients and customes of places of public accommodation, and users of telephone services. There are approximately 24 million hearing impaired and 2.75 million speech impaired persons in the United States that will benefit from having telecommunication relay service available to them.

B. ECONOMIC IMPACT ON THE INDIVIDUALS, CONSUMERS AND BUSINESSES AFFECTED

Individuals with disabilities will have barriers to participation in all aspects of our society eliminated, permitting them to be employed, use public transportation, enjoy the services of State and local governments and public accommodations and use telephone services.

Savings to the public and private sectors in the form of increased earnings for people with disabilities and decreased government benefit and private insurance and benefit payments is estimated to be in the billions of dollars per year.

Costs to businesses for reasonable accommodations are expected to be less than $100.00 per worker for 30% of workers needing an accommodation, with 51% of those needing an accommodation requiring no expenses at all. A Louis Harris national survey of people with disabilities found that among those employed, accommodations were provided in only 35% of the cases.

For renovation and new construction, costs of accessibility are generally between zero and one percent of the construction budget. For new buses, lifts are available for approximately $11,000 per bus, with a Federal subsidy for 80% of the capital costs of municipal buses. There are no reliable figures for determining how much the provision of telecommunications relay service will cost. AT&T has informally estimated the cost to be around $300 million, while the Federal Communications Commission's estimate is $250 million. This translates to about $1.20 per customer per year.

Impact of the act on personal privacy

The Committee believes that this legislation has no significant impact on personal privacy. With respect to telecommunications, the legislation contains provisions to ensure that the privacy of the individuals using the service is protected. Section 225(d)(1)(F) of the Communications Act of 1934, as added by this legislation, specifically prohibits relay operators from disclosing the content of any relayed conversation and from keeping records of the content of any conversations beyond the duration of the call. Section 225(d)(1)(G) also prohibits relay operators from intentionally altering a relayed conversation. The Federal Communications Commission is directed to adopt regulations to enforce these provisions. Violators of these provisions are subject to the penalty provisions contained in the Communications Act.

Additional paperwork, time and costs

With respect to titles I (employment), II (public services), and III (public accommodations), the bill would result in some additional paperwork, time and costs to the EEOC, the Justice Department, and the Department of Transportation, which are entrusted with the enforcement of the Act. The bill does not contain additional recordkeeping requirements.

With respect to title IV (telecommunication relay services), this legislation will require minimal amount of paperwork. The Federal Communications Commission must adopt rules to implement this legislation, and for this purpose should collect and review comments from interested parties. The Commission has an outstanding rulemaking proceeding at the present time which can be supplemented to implement this legislation. This should reduce the regulatory burden on the Commission and interested parties. Some additional paperwork will be required of States that wish to certify their programs with the Commission. One certified, however, the enforcement and paperwork burdens will be transferred to the State with minimal oversight by the Commission. Further, once the carriers have established systems that comply with this legislation, additional oversight and paperwork should be minor.

VIII. Cost Estimate

U.S. Congress,
Congressional Budget Office,
Washington, DC, August 29, 1989.

Hon. Edward M. Kennedy,
Chairman, Committee on Labor and Human Resources,
U.S. Senate, Washington, DC.

Dear Mr. Chairman: The Congressional Budget Office has reviewed S. 933, the Americans with Disabilities Act of 1989, as ordered reported by the Committee on Labor and Human Resources on August 2, 1989. CBO estimates enactment of S. 933 would result in no direct spending by the federal government. The bill would require several agencies to establish regulations and standards with regard to this bill. We estimate the costs of these activities to be $20 million in fiscal year 1990 and $19 million annually in 1991-1994, assuming appropriation of the necessary funds. The costs to state and local governments are likely to be greater, particularly for improvements in transit systems. While these costs cannot be precisely estimated, they are discussed under costs to state and local governments.

If enacted, S. 933 would prohibit discrimination against people with disabilities in areas such as employment practices, public accommodations and services, transportation services and telecommunication services. S. 933 would require that the Equal Employment Opportunities Commission, the Department of Transportation, the Architectural and Transportation Barriers Compliance Board, the Department of Justice, and the Federal Communications Commission develop and issue regulations and standards for implementation and enforcement of this Act.

IMPACT ON THE FEDERAL BUDGET

Equal Employment Opportunities Commission (EEOC).—Title II—Public Services—would prohibit discrimination by employers against qualified individuals with disabilities. S. 933 would require the EEOC to issue regulations to carry out Title II and to provide for enforcement of the provisions. Although no specific authorization level is stated in the bill, CBO estimates this cost would be $15 million annually. This estimate is based on the EEOC's past experience with enforcing civil rights standards and assumes that approximately 240 additional full-time employees would be need for the Commission's 52 field offices and that approximately 70 additional staff would be needed for the EEOC headquarters.

Department of Transportation.—S. 933 would direct the Secretary of Transportation to issue regulations within one year including standards applicable to the facilities and vehicles covered by these provisions. CBO estimates that the cost to the federal government of developing these regulations would be about $0.5 million in fiscal year 1990. In addition, the federal government might bear some part of the costs of making transit services accessible to the handicapped, which are discussed below. The capital and operating costs of most mass transit systems are heavily subsidized by the federal government through grants by the Urban Mass Transportation Administration. We cannot predict the extent to which these grants might be increased to compensate for the additional costs attributable to S. 933.

Architectural and Transportation Barriers Compliance Board.—S. 933 would require the board to develop, issue, and maintain minimum guidelines for the design of accessible buildings, facilities and vehicles, and to establish an advisory committee for the following study. The board would be required to undertake a study to determine (1) the needs of individuals with disabilities with regards to buses and (2) a cost-effective method for making buses accessible and usable by those with disabilities. Although no specific authorization level is stated in the bill, CBO estimates the cost of the guidelines, study and advisory committee would be $0.3 million in fiscal year 1990, $0.3 million in 1991, $0.1 million in 1992, $0.1 million in 1993 and $0.2 million in 1994. The cost estimate for this section fluctuates because: (1) salaries and expense costs ($104,000) are reflected in all years, (2) the study costs ($150,000) are reflected in fiscal years 1990 and 1991, (3) the advisory committee costs ($40,000) are reflected in 1991 and 1992, and (4) the research contracts costs ($80,000) for updating the minimum guidelines are reflected in 1994. This estimate assumes that 2.5 additional full-time employees would be needed as well as additional research contracts for the study and guidelines.

Department of Justice.—S. 933 also would require the Attorney General to develop regulations to carry out sections 201 and 202 of Title II—Public Services—and to investigate alleged violations of Title III—Public Accommodations—which includes undertaking periodic reviews of compliance of covered entities under Title III. These regulations would ensure that a qualified individual with a disability would not be excluded from participation in, or denied benefits by a department, agency, special purpose district or other instrumentality of a state or local government. Based on discussions with staff in the Department of Justice and on comparisons with the costs of similar tasks in other agencies, we estimate the cost of these activities would be $4 million annually.

Federal Communications Commission (FCC).—S. 933 requires the FCC to prescribe and enforce regulations with regards to telecommunications relay services. These regulations include: (1) establishing functional regulations, guidelines and operations for telecommunications relay services, (2) establishing minimum standards that shall be met by common carriers, and (3) ensuring that users of telecommunications relay services pay rates no greater than rates paid for functionally equivalent voice communication services with respect to duration of call, the time of day, and the distance from point of origination to point of termination. While no authorization level is stated, CBO estimates the cost of developing and enforcing these regulations to be $0.1 million in fiscal year 1990, negligible in fiscal year 1991, $0.2 million in 1992, $0.2 million in 1993, and $0.1 million in 1994. The FCC anticipates a lull in fiscal year 1991 because the states will be designing telecommunications relay systems and there won't be much FCC involvement. During fiscal years 1992 and 1993, the actual certification and evaluation of state programs would occur.

In addition to the federal costs of establishing and enforcing new regulations, S. 933 could also affect the federal budget indirectly through changes in employment and earnings. If employment patterns and earnings were to change, both federal spending and federal revenues could be affected. There is, however, insufficient data to estimate these secondary effects on the federal budget.

COSTS TO STATE AND LOCAL GOVERNMENTS

Public Buildings.—S. 933 would mandate that newly constructed state and local public buildings be made accessible to the handicapped. All states currently mandate accessibility in newly constructed state-owned public buildings and therefore would incur little or no costs if this bill were to be enacted. It is possible, however, in rare cases, for some local governments not to have such law. These municipalities would incur additional costs for making newly-constructed, locally-owned public buildings accessible if this bill were to become law. According to a study conducted by the Department of Housing and Urban Development in 1978, the cost of making a building accessible to the handicapped is less than one percent of total construction costs. This estimate assumes that the accessibility features are included in the original building design. Otherwise, the costs could be much higher.

Public Transit.—Due to the limited time available to prepare this estimate, CBO cannot provide a comprehensive analysis of the impact of S. 933 on mass transit costs of state and local governments. The scope of the bill's requirements in this area is very broad, many provisions are subject to interpretation, and the potential effects on transit systems are significant and complex. While we have attempted to discuss the major potential areas of cost, we cannot assign a total dollar figure to these costs.

S. 933 would require that all new buses and rail vehicles be accessible to handicapped individuals, including those who use wheelchairs, and that public transit operators offer paratransit services as a supplement to fixed route public transportation. In addition, the bill includes a number of requirements relating to the accessibility of mass transportation facilities. Specifically, all new facilities, alterations to existing facilities, intercity rail stations, and key stations in rapid rail, commuter rail, and light rail systems would have to be accessible to handicapped persons.

Bus and Paratransit Services.—CBO estimates that it would cost state and local governments between $20 million and $30 million a year over the next several years to purchase additional lift-equipped buses as required by S. 933. Additional maintenance costs would increase each year as lift-equipped buses are acquired, and would reach $15 million by 1994. The required paratransit systems would add to those costs.

Based on the size of the current fleet and on projections of the American Public Transit Association (APTA), CBO expects that public transit operators will purchase about 4,300 buses per year, on average, over the next five years. About 37 percent of the existing fleet of buses is currently equipped with lifts to make them accessible to handicapped individuals and, based on APTA projections, we estimate that an average of 55 percent to 60 percent of future bus purchases will be lift-equipped in the absence of new legislation. Therefore, this bill would require additional annual purchases of about 1,900 lift-equipped buses. Assuming that the added cost per bus for a lift will be $10,000 to $15,000 at 1990 prices, operators would have to spend from $20 million to $30 million per year, on average, for bus acquisitions as a result of this bill.

Maintenance and operating costs of lifts have varied widely in different cities. Assuming that additional annual costs per bus average $1,500, we estimate that it would cost about $2 million in 1990, increasing to $15 million in 1994, to maintain and operate the additional lift-equipped buses required by S. 933.

In addition, bus fleets may have to be expanded to make up for the loss in seating capacity and the increase in boarding time needed to accommodate handicapped persons. The cost of expanding bus fleets is uncertain since the extent to which fleets would need to be expanded depends on the degree to which handicapped persons would utilize the new lift-equipped buses. If such use increases significantly, added costs could be substantial.

These costs are sensitive to the number of bus purchases each year, which may vary considerably. In particular, existing Environmental Protection Agency emissions regulations may result in accelerated purchases over the next two years as operators attempt to add to their fleets before much more stringent standards for new buses go into effect. Such variations in purchasing patterns would affect the costs of this bill in particular years. In addition, these estimates reflect total costs for all transit operators, regardless of their size. Costs may fall disproportionately on smaller operators, who are currently more likely to choose options other than lift-equipped buses to achieve handicapped access.

The bill also requires transit operators to offer paratransit or other special transportation services providing a level of service comparable to their fixed route public transportation to the extent that such service would not impose an "undue financial burden". Because we cannot predict how this provision will be implemented, and because the demand for paratransit services is very uncertain, we cannot estimate the potential cost of the paratransit requirement, but it could be significant. The demand for paratransit services probably would be reduced by the greater availability of lift-equipped buses.

Transit Facilities.—We expect that the cost of compliance with the provisions concerning key stations would be significant for a number of transit systems, and could total several hundred million dollars (at 1990 prices) over twenty years. The precise level of these costs would depend on future interpretation of the bill's requirements and on the specific options chosen by transit systems to achieve accessibility. The costs properly attributable to this bill would also depend on the degree to which transit operators will take steps to achieve accessibility in the absence of new legislation.

In 1979, CBO published a study (*Urban Transportation for Handicapped Persons: Alternative Federal Approaches,* November 1979) that outlined the possible costs of adapting rail systems for handicapped persons. In that study, CBO estimated that the capital costs of adapting key subway, commuter and light rail stations and vehicles for wheelchair users would be $1.1 billion to $1.7 billion, while the additional annual operating and maintenance costs would be $14 million to $21 million.

Based on a 1981 survey of transit operators, the Department of Transportation has estimated that adapting key stations and transit vehicles would require additional capital expenditures of $2.5 billion over 30 years and would result in additional annual operating costs averaging $57 million (in 1979 dollars) over that period. Many groups representing the handicapped asserted that the assumptions and methodology used by the transit operators in this survey tended to severely overstate these costs. The department estimated that the cumulative impact of using the assumptions put forth by these groups could lower the total 30-year costs to below $1 billion.

CBO believes that the figures in both these studies significantly overstate the cost of the requirements of S. 933, because, in the intervening years, several of the major rail systems have begun to take steps to adapt a number of their existing stations for handicapped access. In addition, based on a draft of language in the committee's report on this bill, we expect that the number of stations that would be defined as "key" under this bill would be much lower than that assumed in either of those studies. Furthermore, the Metropolitan Transit Authority in New York and the Southeastern Pennsylvania Transportation Authority in Philadelphia, two large rail systems, have entered into settlement agreements with handicapped groups that include plans for adaptation of key stations. The committee's draft report language indicates that these plans would satisfy the bill's requirement for accessibility of key stations. Other rail systems are also taking steps to make existing stations accessible. Therefore, we expect that the cost of the bill's requirements concerning key stations would probably not be greater than $1 billion (in 1990 dollars) and might be considerably less.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Cory Leach (226-2820) and Marjorie Miller (226-2860).

Sincerely,

ROBERT D. REISCHAUER,
Director.

IX. CHANGES IN EXISTING LAWS

In the opinion of the Committee, it is necessary to dispense with the requirements of paragraph (12) of rule XXVI of the Standing Rules of the Senate in order to expedite the business of the Senate.

ADDITIONAL VIEWS OF SENATOR HATCH

The story of America is one of ever growing inclusiveness, as more and more Americans have become able to participate in the great mainstream of American life. Persons with disabilities, no less than other Americans, are entitled to an equal opportunity to participate in the American dream.

Indeed, through their own efforts, and with the benefit of a growing array of programs and antidiscrimination provisions at the local, state, and federal levels designed to enhance their abilities to lead lives of independence, not dependence, persons with disabilities have long been writing an inspiring chapter in this quintessential American story. Persons with disabilities, through their hard work and determination, have already made great advances and destroyed many stereotypes which have been used to deny them equal opportunities in the past. They have demonstrated they are no "insular minority" in America. But more can still be done to provide equal opportunity for persons with disabilities.

At the outset of the hearings on S. 933, I stated my support for a comprehensive federal civil rights bill banning discrimination against persons with disabilities. Such protection against discrimination is long overdue. At the same time, I also expressed the view that such legislation must be both meaningful and reasonable. Accordingly, I was unable to endorse S. 933, as introduced. There were several serious problems with S. 933, as introduced, including: its excessive penalty scheme; its breadth of coverage of "public accommodations"; its significant departure from the standards of Section 504 of the Rehabilitation Act of 1973, which bans disability discrimination in programs or activities receiving federal aid and in federally conducted programs; and its onerous treatment of the private bus industry.

The substitute version, which emerged from a period of negotiations and was adopted unanimously by the Labor and Human Resources Committee, is still not a perfect compromise. It retains features that I believe merit further improvement. But it incorporated enough important changes to enable me to cosponsor it at the mark-up, while I reserved my right to pursue further changes on the Floor.

At the mark-up, the Committee accepted an amendment which I offered, requiring the Attorney General, in consultation with other federal agencies, to develop and implement a plan to assist covered entities in understanding their duties under the bill.

I also have further concerns about the bill in certain areas.

I. SMALL BUSINESS EXEMPTION FOR PUBLIC ACCOMMODATIONS

Title I of the bill bans employment discrimination and is effective in two years. At that time, the employment discrimination provisions will apply to employers with 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year. Two years thereafter—four years after enactment—the employment provisions will apply to employers of 15 or more employees.

Title III of the bill covers "public accommodations and services operated by private entities." Private entities defined as "potential places of employment" are subject only to accessibility requirements concerning new facilities designed and constructed for first occupancy later than 30 months after the bill's enactment. These entities include facilities intended for nonresidential use and whose operations affect commerce. Section 301(2).

Private entities defined as "public accommodations," which include much of the private sector, are subject not only to this new construction requirement but also to a wide variety of prohibitions and obligations with respect to their existing facilities and general policies. These prohibitions and obligations pertain to a business in its treatment of customers, clients, and visitors.

The term "public accommodation" is defined very broadly. It includes not only businesses covered by Title II of the 1964 Civil Rights Act, which bans racial, ethnic, and religious discrimination in public accommodations, defined as places of eating; places of lodging; places of entertainment; and gasoline stations, but it also includes retail stores, service establishments, and other elements of the private sector. Section 301(e).[1]

This ban on discrimination in privately operated "public accommodations" in Title III of the bill is effective 18 months after enactment. In stark contrast to the small business exemption from the bill's employment provisions, however, the bill contains no small business entity exemption whatsoever from these public accommodations provisions.

Thus, the bill creates the following anomaly: a mom-and-pop grocery store is not subject to the bill when it hires a clerk as a new employee, but it is subject to all of the bill's requirements in its treatment of customers, as well as to an extremely onerous penalty scheme when it violates any of these requirements.

Even under the standards of the substitute bill, the costs some small businesses may incur can be significant.[2] In the disability rights area, nondiscrimination requirements, including those in this bill, not only require elimination of outright exclusion based on stereotypes, they often impose additional duties to make reasonable accommodations to the needs of persons with disabilities. I support these requirements. But, we must acknowledge that these accommodations can cost money. Sometimes the cost is not great, but even under the standards of this bill, these costs can be more than *de minimus* where necessary to provide accessibility. This is a crucial difference between a disability civil rights statute and a civil rights statute in the race area. In order to provide equal treatment to racial minorities, a business need only disregard race and judge a person on his or her merits. To provide equal opportunity for a person with a disability will sometimes require additional actions and costs than those required to provide access to a person without a disability.

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[1] Religious organizations and entities controlled by religious organizations are completely exempt from coverage under Title III.

[2] Some persons may assert that costs should not be a factor in designing a disability civil rights law. In the context of a disability rights law, however, costs may have to be incurred in order to provide nondiscriminatory treatment; e.g., putting in a ramp, providing auxiliary aids and services, and other accommodations. Indeed, the failure to incur reasonable costs in order to provide access is regarded as discriminatory. At some point, however, the undertaking of an accommodation can be so costly or represent such a fundamental alteration in the covered entity's program that the failure to undertake the accommodation is simply not discriminatory. This principle reflects Supreme Court caselaw interpreting Section 504 of the Rehabilitation Act of 1973. E.g. *School Board of Nassau County* v. *Arline*, 480 U.S. 273, 287 n. 17 (1987); *Alexander* v. *Choate*, 469 U.S. 287 (1985); *Southeastern Community College* v. *Davis*, 442 U.S. 397, 409–414 (1979).

For example, under the public accommodations title of this bill, covered entities must seek to provide "full and equal enjoyment of [their] goods, services, facilities, privileges, advantages and accommodations." Section 302(a). Among the specific requirements applicable to the smallest businesses are:

1. The obligation to provide auxiliary aids and services to persons with disabilities, unless to do so would cause either an undue burden to the entity or a fundamental alteration in its activities. Section 302(b)(2)(A)(iii). Auxiliary aids and services are defined in Section 3(1) and can include providing qualified interpreters, qualified readers, signage, taped texts; the acquisition or modifications of equipment or devices; and similar actions and devices.

2. The obligation to make reasonable modifications in policies, practices, and procedures, unless doing so fundamentally alters the entity's activities. Section 302(b)(2)(A)(ii).

3. The obligation to remove "architectural barriers, and communication barriers that are structural in nature, in existing facilities * * * where such removal is readily achievable." Section 302(b)(2)(A)(iv). The term "readily achievable" is defined in Section 301(5).

4. The obligation to remove "transportation barriers in existing vehicles used by an establishment for transporting individuals (not including barriers that can only be removed through the retrofitting of vehicles by the installation of a hydraulic or other lift), where such removal is readily achievable." Section 302(b)(2)(A)(iv)).

5. Where the removal of a barrier described in paragraphs 3 and 4 is not readily achievable, an obligation "to make [the entity's] goods, services, facilities, privileges, advantages available through alternative methods if such methods are readily achievable." Section 302(b)(2)(A)(v).

6. The elimination of eligibility criteria that screen out or tend to screen out a person or persons with disabilities unless the criteria are shown to be necessary to the conduct of the activity in question. Section 302(b)(2)(A)(i).

While these requirements will, in theory, generally translate into less actual cost the smaller the entity, any financial or administrative impact on the smallest businesses can be very troublesome for those businesses. Even comparatively "lesser" costs can be quite burdensome for a small business struggling to survive. Further, the determination as to whether an accommodation is an undue burden or a barrier removal is readily achievable may ultimately be made by a federal agency or judge. A small business is less able to absorb an overreaching determination by these authorities than a larger business.

Moreover, government compliance reviews (Section 308(b)(1)), and the costs of private as well as Attorney General litigation, will add further to those expenses small businesses must bear under the bill's public accommodation title. Indeed, in a private enforcement action, a plaintiff can obtain injunctive relief and attorneys fees. For larger businesses, these costs can be more readily absorbed and passed on to a large consumer base. For some smaller businesses, the cost of compliance with injunctive relief combined with attorneys fees might be onerous.

But it is the penalty scheme in an Attorney General action to enforce the public accommodations title that is of particular concern. In an Attorney General action, a court, at the request of the Attorney General, can order the smallest business to pay monetary damages to aggrieved persons. Moreover, the court can order such a business to pay a civil penalty of up to $50,000 for a first violation and up to $100,000 for subsequent violations. This remedy scheme is potentially a very heavy burden, which I will also address as a separate concern.

Opponents of a small business exemption in the public accommodations title of S. 933 claim that since Title II of the 1964 Civil Rights Act has no small business exemption, neither should S. 933. There are several responses to this argument:

1. S. 933 already departs from Title II of the 1964 Civil Rights Act in two important ways:

A. Title II only covers places of eating, lodging, entertainment, and gasoline stations. S. 933 goes well beyond such coverage, encompassing virtually all elements of the private sector as "public accommodations" or "potential places of employment," except religious organizations and entities controlled by religious organizations.

B. Title II provides only for injunctive relief in Attorney General actions; this bill, as mentioned earlier, permits recovery of monetary damages and huge civil fines in Attorney General actions.

Thus, it is inconsistent for the opponents of a small business exemption to rely upon Title II as the basis for their opposition when they have so readily departed from that parallel statute in other important respects.

2. In any case, compliance with Title II of the 1964 Civil Rights Act imposes no costs—it simply requires admitting and serving persons without regard to their color, ethnicity, or religion. As mentioned earlier, compliance with S. 933 can result in costs to covered entities. This difference between Title II and S. 933 alone justifies a small business exemption in public accommodations.

I favor an exemption of small businesses from the prohibitions and obligations in the public accommodations provisions of the bill, i.e., provisions relating to a business's existing facilities and general policies. I would not, however, exempt *any* public accommodation from the requirement that its new facilities be accessible. The cost of accessibility to a new facility when "built-in" to the plans and construction of such a new facility is not burdensome. But for businesses in the operation of their existing facilities and in the provision of auxiliary aids and services, modifications of policies, procedures, and criteria, a small entity exemption is appropriate.

I also believe that even with an exemption for small businesses, the marketplace will exert pressure on small businesses which will lead to increased accessibility. When a small business operator sees a larger competitor gain customers with disabilities because the latter business is accessible, the small business operator is likely to take steps it can afford to get some of those customers—even if those steps don't meet every single requirement of this title—without exposure to the costs of compliance reviews and litigation.

With this voluntary activity, the requirement that *all new* facilities be accessible, and the full coverage of all "public accommodations" other than small businesses, I believe we can provide genuine access to public accommodations for persons with disabilities, while assuring that we do not overly burden small businesses in America.

II. EXCESSIVE PENALTIES AGAINST PUBLIC ACCOMMODATIONS

Under Title II of the 1964 Civil Rights Act (hereinafter "Title II"), as mentioned earlier, a private plaintiff can obtain injunctive relief and attorneys fees. The Attorney General can obtain injunctive relief. No monetary damages or civil penalties are available in either action.

Under S. 933, in an action for a violation of the public accomodations title, a private plaintiff can obtain an injunction and attorneys fees. I believe such relief, paralleling that of Title II, is appropriate.

But, in an Attorney General action under this bill the court can award not only an injunction, but also civil penalties of up to $50,000 for a first violation, and up to $100,000 for subsequent violations. Further, the court can award monetary damages to aggrieved persons when requested to do so by the Attorney General. This relief is excessive and unjustifiable.

The threat of litigation, its cost to covered entities, the added expense of paying the plaintiff's attorneys fees in private litigation, and marketplace factors are all powerful incentives for a business to comply with this bill in the first instance.

Moreover, if an entity is in noncompliance, injunctive relief is significant. An injunction requires the offending entity to cease its discrimination. If a ramp must be put in, a bathroom made accessible, or policies changed, pursuant to the entity's duties under the bill's public accommodations provisions, a court can order such relief.

Everyone knows that 25 years ago black people and other racial and ethnic minorities were routinely denied the opportunity to eat, to lodge, and to be entertained in places they could afford. Today, while there are still instances of racial and ethnic discrimination in public accommodations, we face an entirely different situation. The public accommodations covered by Title II are now essentially open on a nondiscriminatory basis. This resulted largely from Title II's enactment, with the injunctive relief and attorneys fees enforcement scheme previously described.

Yet, relief in an Attorney General action against a public accommodations under this bill goes well beyond the relief available in an Attorney General action under Title II.

Ironically, a private party, in his own action, cannot obtain monetary damages for himself. The court can award monetary damages, however, to an aggrieved person, in an Attorney General action.

There is a further anomaly in the bill. The bill subjects state and local governments to the remedies available under Section 505 of the Rehabilitation Act of 1973. Under Section 505, a federal agency, in an enforcement action, may either terminate federal aid to the part of a covered entity where the discrimination occurs or it may refer the case to the Department of Justice for injunctive relief. Civil penalties are not recoverable by the federal government in an enforcement action. Thus, in an Attorney General action, state and local governments, with their enormous tax resources, are subject to lesser penalties than the private sector, which is not supported by tax revenues or, for the most part, federal aid. The potential for a sole proprietor, a mom-and-pop business, or any other business to be more harshly sanctioned than a state or local government in an Attorney General action requires further consideration.

Our purpose here should not be punitive. Providing for monetary damages and huge civil penalties in Attorney General actions is excessive. To the extent we are trying to provide access by enacting this bill, since such access can impose costs on covered entities, rather than penalize a public accommodation by imposing monetary damages and huge civil penalties, we should keep the money available to the entity for use in providing access pursuant to the injunctive relief.

Proponents of the stiff remedy provisions in S. 933 assert that it parallels remedies now available in an Attorney General action under the Fair Housing Act, as amended last year. This analogy, however, is unpersuasive.

In the field of housing, the original remedies of the 1968 Fair Housing Act proved inadequate to the task of rooting out racial and ethnic discrimination in housing as quickly as hoped. Why? In my opinion, it is because housing discrimination is probably the most peristent form of racial discrimination in the nation today. Thus, toughening the penalties for such discrimination in 1988 made sense and I supported the effort to do so.

But the record in the public accommodations area is much different. As mentioned earlier, the Title II penalties—injunctive relief and attorneys fees—have been adequate to work a revolution of equal opportunity.

If the Fair Housing Amendments Act of 1988 had not added disability discrimination to the list of prohibited conduct under the Fair Housing Act, and a ban on housing discrimination on the basis of disability was being added in this bill, the use of Fair Housing Act remedies for such housing discrimination would be appropriate. It is inappropriate, however, to use the Fair Housing Act, rather than Title II of the 1964 Civil Rights Act, as the analogue for the remedies in the public accommodations context in this bill.

I note that, with respect to employment discrimination, S. 933 uses the remedies available under the parallel civil rights statute, Title VII of the 1964 Civil Rights Act. Unfortunately, this parallelism was not maintained with respect to public accommodations.

I prefer to retain such parallelism in remedies. I am prepared, however, to break the parallelism with Title II and to consider a more modest enforcement scheme in this area that goes beyond Title II relief but is more reasonable than the provision currently in the bill.

III. THE BILL'S THREAT TO THE PRIVATE BUS TRANSPORTATION INDUSTRY

The bill applies to transportation services "provided by a privately operated entity that is primarily engaged in the business of transporting people," except for air carriers. Section 304(a). This coverage includes private rail, limousine, taxi, and bus companies.

I am especially concerned about this bill's impact on the private bus transportation industry. The bill imposes a variety of requirements on these companies, including:

1. The obligation to make reasonable modifications in policies, practices, and procedures, unless to do so would fundamentally alter the company's activities. Section 304(b)(2)(A).
2. The obligation to provide auxiliary aids and services to persons with disabilities, unless to do so would cause an undue burden or fundamentally alter the company's activities. Section 304(b)(2)(B).
3. The obligation to remove "transportation barriers in existing vehicles * * * where such removal is readily achievable." This obligation does not include the addition of a lift. Section 304(b)(2)(C).
4. Where the removal of a barrier described in paragraph 3 is not readily achievable, an obligation "to make [the entity's] goods, services, facilities, privileges, advantages available through alternative methods if such methods are readily achievable." Section 304(b)(2)(C).

I favor these provisions.

The truly onerous provision, however, is the requirement that all small bus companies must purchase or lease all new over-the-road buses with lifts six years after the bill's enactment; large bus companies must do so beginning five years after enactment. In the meantime, ironically having imposed this major requirement on the private bus transportation industry, the bill requires a three-year study to determine whether this requirement is, in effect, feasible. The requirement, however, is not contingent on the results of the study—it remains in place under this bill even if the study shows that the requirement is excessive.

The bill, in its present form, presents the strong likelihood that private intercity and charter and tour bus service will be seriously curtailed soon after the bill's new bus requirements become effective, if not virtually eliminated at some point thereafter. The stakes are that high.

Unlike state and local government mass transit, which is heavily subsidized by the federal government, private transportation companies receive virtually no federal aid. Private companies provide virtually all of the intercity bus transportation in the country. There are well over one thousand such private, intercity bus companies, such as Greyhound, Gold Line, East Coast Parlor, and Peter

Pan. Some of these companies provide two kinds of services: over the road regular route service—that is, scheduled service between communities—and charter and tour services. Other companies provide only charter and tour services.

These companies serve about 10,000 communities, most of which have no other intercity transportation available to them. The number of communities served has been declining in the last 30 years. According to an Interstate Commerce Commission staff analysis, there was a net loss of nearly 3,400 communities receiving intercity bus service between 1982 and 1986 alone. Ninety percent of the communities losing this service had populations of less than 10,000. This industry operates on a low profit margin. In many rural areas, including in Utah, this private bus service is the only available intercity transportation. There is only token Amtrak service available. Intercity buses provide transportation for those who need a low cost transportation alternative.

The requirement that all new buses have wheelchair lifts would quickly accelerate the loss of private, intercity bus service to our nation's communities, if not entirely end such service, according to the American Bus Association, United Bus Owners of America, and Greyhound (the largest company). Delaying this result by five or six years, in the hope an efficient and economical lift will appear on the scene, is small comfort.

A lift for an intercity bus is more expensive than for an intracity bus, such as the Metrobuses used in the District of Columbia, because with the baggage compartment and other differences, access to the intercity bus is higher off the ground—as much as four or six feet, rather than one foot for an intracity bus.

The added costs for new buses for these private companies include not only the cost of the lift but widening the aisles and making the bathrooms accessible. There are maintenance costs—and there is little experience with maintenance of intercity bus lifts. There will be a loss of as many as four seats, which especially hurts bus companies during their peak periods, such as holiday periods. Moreover, particularly in rural areas, these companies are successful because of their package express service. The room available for carrying such packages, however, is reduced in lift-equipped buses.

Even if the least expensive lift is used on all new buses—and this is, I am told, a lift which has had little use in this country and one which not all bus companies might feel is suited to their operations—the cost of this provision is unreasonable. Indeed, I understand that the principal basis for this provision is information from the Regional Transportation District of Denver, Colorado. According to the Department of Transportation, however, Denver has only 17 buses which use a "less expensive" lift developed in Germany. I understand these buses have been in use in Denver for about one year. Moreover, according to the Department of Transportation, Denver uses these buses on one-way routes of less than 30 miles. This usage is atypical for the private bus industry as a whole, which consists of some 20,000 buses which travel far greater distances on trips.

Representatives of the private bus transportation industry have stated that their lowest annual cost estimate for the bill's requirement regarding new buses, which includes lift and accessible restroom installation, loss of revenue seats for lift and restroom accessibility, maintenance costs, and training costs would be so high as to seriously threaten the viability of the private bus transportation industry. This lowest annual cost estimate is based on a cost of $10,100 per new bus for each year its service, and assumes a 10-year life span for the industry's 20,000 bus fleet. In other words, under this analysis, each new bus will cost a company $101,000 over the life of the bus. I note that representatives of the industry believe these estimates are unrealistic and actual costs will be higher.

The Committee heard virtually no testimony on this vital issue. I, along with proponents of the present provision, can point to correspondence from officials of the Denver system and the American distributor of the lift in question citing a variety of different figures and costs related to wheelchair accessibility for these over-the-road buses. Following the hearings on the bill, the cost figures have been flying back and forth concerning costs associated with the lift which has recently begun to be used in Denver. The dispute over the utility of any particular lift and its costs are precisely why a study is most appropriate.

I support a requirement that bans discrimination based on stereotypes against persons with disabilities in their use of privately operated buses. I also support a requirement that private bus companies make reasonable accommodations to the needs of persons with disabilities with respect to their current bus fleet.

The Committee, however, simply has not been presented with enough clear testimony and data to know what is reasonable with respect to requirements such as lifts on new buses purchased or leased by the private bus industry. That is why a study of private bus accessibility, followed by Congressional action based on the study, is the most sensible course of action with respect to any future requirements, such as lifts, concerning new buses.

It might be suggested that this bill will have no significant impact on bus companies for the next five years. Even this suggestion is doubtful. In an August 1, 1989, letter to Roger Porter, domestic policy advisor to the President, Theodore Knappen, a Senior Vice President at Greyhound Lines, Inc., opposed this provision of S. 933. He wrote, "Greyhound Lines Inc. is a new company, which is the result of the merger of two failing bus systems, Greyhound and Trailways. We are highly leveraged with $375 million in debt * * *." Greyhound "lost $17 million last year and will be marginally profitable this year. The annual cost of full implementation of S. 933 will be at a minimum, $40 million. Even if the startup is delayed for five years, the financial institutions upon which we rely are not likely to continue to support us in light of this burden. The system will inevitably crumble with the marginal rural service being the first to go. I should add that most small bus companies are in a similar financial situation."

In summary, the current provision regarding the private bus transportation industry's purchase and lease of readily accessible new buses rests on inadequate and contested data and runs a serious risk of unintentionally causing devastating effects in the private bus industry. The prudent course is to study the issue first and then to impose appropriate requirements based on the study—not the reverse, as currently provided for in the bill.

ORRIN G. HATCH.

ADDITIONAL VIEWS OF SENATOR COATS

I am pleased to have been able to vote in favor of reporting S. 933 favorably out of Committee despite certain problems that I see in this legislation. Full and equal protection under the law for persons with disabilities is long overdue. Our society must no longer tolerate discrimination against any of its citizens, especially those with physical and mental impairments.

I believe that this landmark civil rights bill, despite its flaws, will accomplish its goals. The ADA bill is comprehensive, far-reaching, fair and tough. It has real teeth in its enforcement provisions. I believe that it will ensure that Americans with disabilities will no longer face discrimination in employment, in public accommodations, in public services, transportation or communications services. I earnestly believe that the provisions of S. 933, together with the force of Judaeo-Christian good will and a healthy and vibrant free market economy, will help bring all disabled persons into the mainstream of American life.

I am pleased that my amendments relating to drug and alcohol abuse and religious institutions were substantially incorporated into the ADA bill during the lengthy negotiations that resulted in the radically amended, much improved version of S. 933 that the Committee finally approved. Despite certain ambiguities that remain in the bill, I am satisfied that S. 933 will ensure that employers can implement a zero tolerance policy and maintain a drug-free workplace. Section 103(c) of Title I is intended to make clear that an individual applicant or employee who currently uses alcohol or illegal drugs is not protected by the ADA's nondiscrimination provisions. Similarly, this section makes clear that an individual who is an alcoholic or current or past user of drugs—illegal or legal—can be held to the same standards of job performance and behavior as other individuals, even if the unsatisfactory performance or behavior is related to the drug use or alcoholism. At the same time, and consistent with the Rehabilitation Act of 1973, it is intended that rehabilitated alcoholics and drug users will be protected under this law. I believe that the bill's language and accompanying report make clear that an employer can subject job applicants and employees to drug urinalysis or other testing to determine the unlawful use of drugs or the presence of alcohol, and can refuse to hire job applicants and can discipline or discharge employees who are found to be using illegal drugs or alcohol, without being charged with discrimination.

Having stated my support for S. 933 and my intention to work for its speedy passage, I also wish to associate myself with the additional views of Senator Hatch. I share many of the concerns he has expressed so clearly, particularly with regard to the need for a small business exemption and the problems facing the bus industry as a consequence of the costly requirements imposed on both by this legislation. I am hopeful that the spirit of compromise and determination which resulted in the amended legislation that we voted out of committee will carry the day, so that these remaining problems can be worked out to the satisfaction of all parties, and this legislation, which has White House support, will be enacted into law.

DAN COATS.

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